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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 09-50026 (REG)

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6 In the Matter of:

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8 MOTORS LIQUIDATION COMPANY, et al.

9 f/k/a General Motors Corporation, et al.,

10  
11 Debtors.

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15 United States Bankruptcy Court

16 One Bowling Green

17 New York, New York

18  
19 November 22, 2010

20 9:51 AM

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23 B E F O R E:

24 HON. ROBERT E. GERBER

25 U.S. BANKRUPTCY JUDGE

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HEARING re Debtors' Motion for an Order (i)Approving Notice of Disclosure Statement Hearing; (ii)Approving Disclosure Statement; (iii)Establishing a Record Date; (iv)Establishing Notice and Objection Procedures for Confirmation of the Plan; (v)Approving Solicitation Packages; and Procedures for Distribution Thereof; (vi)Approving the Forms of Ballots and Establishing Procedures for Voting on the Plan; and (vii)Approving the Form of Notices to Non-Voting Classes Under the Plan

HEARING re Order Pursuant to Bankruptcy Rule 2004 Authorizing the Official Committee of Unsecured Creditors of Motors Liquidation Company to Obtain Discovery from (i)the Claims Processing Facilities for Certain Trusts Created Pursuant to 11 U.S.C. § 524(g); (ii)the Trusts; and (iii)General Motors, LLC and the Debtors

Transcribed by: Lisa Bar-Leib

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A P P E A R A N C E S :

WEIL GOTSHAL & MANGES LLP

Attorneys for the Debtors and Debtors-in-Possession

767 Fifth Avenue

New York, NY 10153

BY: STEPHEN KAROTKIN, ESQ.

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Attorneys for the Official Committee of Unsecured  
Creditors

1177 Avenue of the Americas

New York, NY 10036

BY: THOMAS MOERS MAYER, ESQ.

PHILIP BENTLEY, ESQ.

DAVID E. BLABEY, JR., ESQ.

JENNIFER SHARRET, ESQ. (TELEPHONICALLY)

CAPLIN & DRYSDALE

Attorneys for Official Committee of Unsecured Creditors

Holding Asbestos-Related Claims

One Thomas Circle, NW

Suite 1100

Washington, DC 20005

BY: TREVOR W. SWETT, ESQ.

U.S. DEPARTMENT OF JUSTICE

United States Attorney's Office

Southern District of New York

86 Chambers Street

New York, NY 10007

BY: DAVID S. JONES, DEPUTY CHIEF, CIVIL DIVISION

AKIN GUMP STRAUSS HAUER & FELD LLP

Attorneys for Claimant Green Hunt Wedlake, Inc. as

Trustee of General Motors Nova Scotia Finance Company

One Bryant Park

New York, NY 10036

BY: NATALIE E. LEVINE, ESQ.

1  
2 FRIEDMAN KAPLAN SEILER & ADELMAN LLP

3 Attorneys for Manville Personal Injury Settlement Trust

4 and Claims Resolution Management Corporation

5 1633 Broadway

6 New York, NY 10019

7  
8 BY: EMILY A. STUBBS, ESQ.

9  
10 GREENBERG TRAURIG, LLP

11 Attorneys for Certain Noteholders of General Motors Nova

12 Scotia Finance Company

13 MetLife Building

14 200 Park Avenue

15 New York, NY 10166

16  
17 BY: JOHN H. BAE, ESQ.

MORVILLO, ABRAMOWITZ, GRAND, IASON, ANELLO & BOHRER, P.C.

Attorneys for Armstrong World Industries, Inc. Asbestos  
Personal Injury Settlement Trust, the Babcock & Wilcox  
Company Asbestos Personal Injury Settlement Trust, the  
Owens Corning/Fibreboard Asbestos Personal Injury Trust,  
the DII Industries, LLC Asbestos PI Trust, the United  
States Gypsum Asbestos Personal Injury Settlement Trust,  
and the Delaware Claims Processing Facility

565 Fifth Avenue

New York, NY 10017

BY: STEPHEN M. JURIS, ESQ.

SIMMONS, BROWDER, GIANARIS, ANGELIDES & BARNERD LLC

Attorneys for Objecting Mesothelioma Victims

707 Berkshire Boulevard

East Alton, IL 62024

BY: ROBERT W. PHILLIPS, ESQ.

1  
2 SIMON EDDINS & GREENSTONE LLP

3 Attorneys for Objecting Mesothelioma Victims

4 3232 McKinney Avenue

5 Suite 610

6 Dallas, TX 75204  
7

8 BY: JEFFREY B. SIMON, ESQ.  
9

10 STUTZMAN, BROMBERG, ESSERMAN & PLIFKA, P.C.

11 Attorneys for Future Claims Representative

12 2323 Bryan Street

13 Suite 2200

14 Dallas, TX 75201  
15

16 BY: SANDER L. ESSERMAN, ESQ.  
17

18 CALIFORNIA DEPARTMENT OF JUSTICE

19 For the State of California

20 300 South Spring Street

21 Suite 1702

22 Los Angeles, CA 90013  
23

24 BY: OLIVIA W. KARLIN, DAG

25 (TELEPHONICALLY)

1  
2 CAMPBELL & LEVINE

3 Attorneys for Delaware Claims Processing Facility

4 800 North King Street

5 Suite 300

6 Wilmington, DE 19801

7  
8 BY: MARLA R. ESKIN, ESQ.

9 (TELEPHONICALLY)

10  
11 CUYLER BURK, P.C.

12 Attorneys for Creditor, All State Insurance Company

13 Parsippany Corporate Center

14 Third Floor

15 Four Century Drive

16 Parsippany, NJ 07054

17  
18 BY: ANDREW K. CRAIG, ESQ.

19 (TELEPHONICALLY)



1  
2 KEATING MUETHING & KLEKAMP PLL

3 Attorneys for Delaware Claims Processing Facility

4 One East Fourth Street

5 Suite 1400

6 Cincinnati OH 45202

7  
8 BY: JENNIFER J. MORALES, ESQ.

9 (TELEPHONICALLY)

10  
11 NEW YORK STATE DEPARTMENT OF LAW

12 Environmental Protection Bureau

13 The Capitol

14 Albany, NY 12224

15  
16 BY: MAUREEN F. LEARY, AAG

17 (TELEPHONICALLY)

1  
2 ROPERS, MAJESKI, KOHN & BENTLEY

3 Attorneys for Creditor, Remy International, Inc.

4 201 Spear Street

5 Suite 1000

6 San Francisco, CA 94105

7  
8 BY: N. KATHLEEN STRICKLAND, ESQ.

9 (TELEPHONICALLY)

10  
11 YOUNG CONAWAY STARGATT & TAYLOR LLP

12 Attorneys for Delaware Claims Processing Facility

13 The Brandywine Building

14 1000 West Street

15 17th Floor

16 Wilmington, DE 19801

17  
18 BY: JENNIFER R. NOEL, ESQ.

19 (TELEPHONICALLY)

1  
2 ZAMLER, MELLEN & SHIFFMAN, P.C.

3 Attorneys for Certain Asbestos Claimants

4 23077 Greenfield Road

5 Suite 557

6 Southfield, MI 48075

7  
8 BY: MARGARET H. JENSEN, ESQ.

9 (TELEPHONICALLY)

10  
11  
12 ANDREW ANDERSON, IN PROPRIA PERSONA

13 (TELEPHONICALLY)

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P R O C E E D I N G S

THE COURT: Okay. GM. Motors Liquidation. We have a couple of matters on the calendar for today. Mr. Karotkin, you want to take the lead and give me an update on where we are and what we need to do?

MR. KAROTKIN: Good morning, Your Honor. Stephen Karotkin, Weil Gotshal & Manges, for the debtors. There are, I think, only two matters on the calendar today. One is the adjourned hearing on the disclosure statement and the other relates to the 2004 examinations requested by the unsecured creditors' committee.

With respect to the disclosure statement, I think I can be fairly brief. I think we are well on the way to resolving all of the issues and getting an amended disclosure statement out for review. There are, however, two fairly significant open issues that the parties are discussing at length. And that relates to the -- primarily to the budgets for the various trusts to be created under the plan. And the unsecured creditors' committee, the Treasury and ourselves have been involved in those discussions. And at least I am hopeful that in the next week or so, we can reach a consensus, but that's not necessarily guaranteed.

My suggestion, Your Honor, subject, of course, to your schedule is that we further adjourn the hearing to -- I think you have a date with us on the 2nd, if you could

1 accommodate us then. It is my hope, and maybe I'm being  
2 optimistic, that we can be finished by then.

3 (Pause)

4 THE COURT: Okay. That's Thursday the 2nd?

5 MR. KAROTKIN: Yes, sir. I guess at 9:45?

6 THE COURT: All right. We'll add it to the list.

7 Yep.

8 MR. KAROTKIN: 9:45?

9 THE COURT: Um-hmm. Mr. Jones?

10 MR. JONES: Your Honor, thank you. David Jones from  
11 the U.S. Attorney's Office. This is a matter of importance to  
12 us so I'll just speak briefly, if I may, although the requested  
13 scheduling change --

14 THE COURT: Can I ask you to come to the main lectern  
15 and replace Mr. Karotkin, please?

16 MR. JONES: Yes, Your Honor. Thank you. Sorry, Your  
17 Honor. Again, David Jones from the U.S. Attorney's Office. We  
18 do consent to and agree that this request at extension makes  
19 sense. We very much hope that all matters can be resolved and  
20 the disclosure statement can be approved as of that date.  
21 Treasury has been talking and had a constructive conversation  
22 with the committee, particularly last Friday, and received  
23 additional information that we had long been seeking last night  
24 to sort of corroborate and provide a firmed-up estimate of  
25 hours to be spent by professionals in the post-effective date

1 period. We are working very hard to be able to reach agreement  
2 on something the Treasury agrees is reasonable. And I won't go  
3 into details of the discussions at all. But the main thing I  
4 want to rise to say is that we've been a bit frustrated at the  
5 pace of progress lately which has been too slow but we think  
6 we're in a position to push. And we hope that all parties will  
7 join us in making a concerted effort so that we can get final  
8 approval next Thursday.

9 THE COURT: Okay. Mr. Mayer?

10 MR. MAYER: The committee also has no objection to  
11 moving the hearing -- the status conference to December 2. We  
12 have our own frustrations. Your Honor, I think, without  
13 getting into details, we have differences with Treasury on a  
14 number of different items. And as -- we are hopeful that if we  
15 cannot compromise on principles, we will at least compromise on  
16 numbers and that will avoid us having to come to this Court for  
17 decisions on principles. But if we can't reach agreement on  
18 December 2 or shortly thereafter, if it doesn't look like it's  
19 going to happen, I anticipate at some point in the near future,  
20 we will ask Your Honor for some court time in January to deal  
21 with the issues of principle that divide the parties. And  
22 that's all I wanted to say.

23 THE COURT: All right. I see no useful purpose in  
24 saying anything more than that. Why don't you guys redouble  
25 your efforts to put these issues to bed. I have a memory that

1 we had actually talked about getting this plan confirmed or at  
2 least the disclosure statement approved back in April or  
3 something like that. The difficulties you all are reaching or  
4 disclosing to me, some of which were mentioned, some of  
5 which -- can I have quiet on the phone, please -- some of which  
6 haven't yet been addressed but I'm going to hear later this  
7 morning are a source of some frustration to me.

8 What's our next matter? Asbestos?

9 MR. MAYER: Your Honor, may those of us who were here  
10 just for the disclosure statement be excused?

11 THE COURT: Sure.

12 MR. MAYER: Thank you.

13 MR. KAROTKIN: Yes, Your Honor. I think it's the  
14 committee's 2004 examination and the objections raised by, I  
15 believe, the attorneys for the various claimants.

16 THE COURT: All right. Then I'll hear brief argument  
17 on those. I'm going to need pretty compelling reason to divert  
18 from my earlier rulings on the subject. They are not res  
19 judicata or collateral estoppel but there sure as heck stare  
20 decisis. And at the risk of stating the obvious, just as I  
21 believe in following the opinions of my brother and sister  
22 judges in this district, my brother and sister bankruptcy  
23 judges, I follow my own rulings. I'll hear from anybody who  
24 wants to raise any different concerns or can convince me very  
25 briefly how I blew it last time.

1 (Pause)

2 THE COURT: I think it's the last two times to be  
3 more exact. Go ahead.

4 MR. SIMON: Thank you, Your Honor. My name is  
5 Jeffrey Simon. I'm with the law firm of Simon Eddins and  
6 Greenstone. We represent several claimants that the UCC has  
7 sought to subpoena submissions to bankrupt trust facilities.  
8 I'm here on their behalf as well as present and future  
9 mesothelioma clients of ours who I would like to show the Court  
10 would be substantially and irreparably harmed by disclosure of  
11 the trust information to Bates White in particular.

12 In my review --

13 THE COURT: Pause, please, Mr. Simon. I understand  
14 how you can speak for present clients. How are you speaking  
15 for future clients?

16 MR. SIMON: Because the information that I believe  
17 will be used to negatively affect my clients in the tort system  
18 will be used by Bates White through its dual identity of  
19 Litigation Resolution Group both now and in the future. It's  
20 simply -- that's simply the point I'm trying to make. It's a  
21 problem that will continue rather than simply be --

22 THE COURT: Do you represent them now or don't you?

23 MR. SIMON: I don't -- I don't actively represent  
24 future clients, of course.

25 THE COURT: But why do you say "actively"?



1 MR. SIMON: I anti --

2 THE COURT: I need straight answers from you, Mr.  
3 Simon. I understand you may be appearing before me for the  
4 first time but this is at least the third, perhaps the fourth,  
5 hearing I've had. And if you haven't appeared before me  
6 before, you can explain away bad facts but I need you to be  
7 precise and not cute when you're describing the facts. Once we  
8 have the facts under our belts then we'll argue about what's  
9 appropriate policy. But first, I'm told, that you don't  
10 actually represent them. And then there was another  
11 qualification. I need statements that I can rely upon without  
12 trying to ascertain what you're leaving out between the lines.  
13 Do I make myself clear?

14 MR. SIMON: Yes, Your Honor.

15 THE COURT: Then continue, please.

16 MR. SIMON: I represent mesothelioma clients today  
17 some of whom have filed claims against GM, some of whom  
18 haven't. What I contend is that the information from the  
19 trust, if disclosed to Bates White in the manner that I  
20 understand it is to be disclosed, will negatively affect my  
21 clients who have mesothelioma who are currently in the tort  
22 system. The reason that I contend that is that, from my review  
23 of the record, I don't believe that anyone adequately disclosed  
24 to Your Honor the depth of the real conflict of interest of  
25 Bates White, that Bates White seeks to be an active defendant

1 in the tort system through its other identity in the  
2 litigation, Litigation Resolution Group. A principal of both  
3 Bates White and Litigation Resolution Group is Dr. Charles  
4 Mullin. What Dr. Charles Mullin advertises on the web is that  
5 they have expertise in not only estimating the liabilities of  
6 solvent tort defendants but providing a mechanism wherein they  
7 provide those defendants with financial certainty by acquiring  
8 those liabilities and handling the defense of asbestos cases  
9 for them.

10 Dr. Mullin testified in the Leslie Controls  
11 bankruptcy proceedings how the kinds of information that is  
12 contained in the trusts would benefit him in his cause of  
13 assisting defendants in the tort system, specifically, that one  
14 of the features of information in trust information is where  
15 certain products were used; specifically, products which were  
16 manufactured or sold by entities now in bankruptcy. And that  
17 with that information, he would have a resource to go to  
18 defendants and say, I am aware of where the proverbial bodies  
19 are buried insofar as I know what you may not know about the  
20 fact that Owens Corning products were used here and Johns  
21 Manville products were used there. And I can assist you in the  
22 defense of your claims in several ways. One is is that I can  
23 tell you what the likely outcome, the likely settlement  
24 dollars, as it were, for bankrupt trust facilities would be  
25 based on information about what kinds of claimants can get how

1 much money from the different trusts based on the nature of  
2 their exposure and where they were. Secondly, I have access,  
3 in this hypothetical now, to tell you how much money they're  
4 likely to get which, in comparative fault schemes where there  
5 are settlement credits, is a crucial piece of information.

6 In the Leslie Controls bankruptcy, Dr. Mullin  
7 testified specifically that anything that affects the end game  
8 affects settlement. And two things that he defines as  
9 affecting the end game are knowing how much money a claimant is  
10 likely to receive from trust facilities whether they actually  
11 have filed the trust submissions or will in the future; and  
12 secondly, how to develop the alternative exposure theories that  
13 the so-called chrysotile defendants seek. For example, Owens  
14 Corning Kaylo, a pipe insulation, contained amosite asbestos as  
15 well as chrysotile. One of the common themes of defending  
16 asbestos cases around the country is to contend as a defense  
17 that a gentleman or woman's mesothelioma was caused not by the  
18 chrysotile containing asbestos product but rather by some  
19 amosite or crocidolite, another kind of asbestos-containing  
20 product. Sometimes, through all their diligence, they don't  
21 find such exposure, either because they can't or it doesn't  
22 exist.

23 Giving them information that this job site and that  
24 job site and the other job site are Kaylo sites, according to  
25 the work of some plaintiffs' firm that has developed evidence

1 to that effect allows them to, simply through the mechanism of  
2 the GM bankruptcy, know there is an alternative exposure theory  
3 that we can now, actively handling the defense of the case, go  
4 after. We can develop the witnesses if there's information to  
5 that effect because sometimes that kind of information is  
6 available. But it simply tells them where to look, how to look  
7 for it and affects the tort system by providing them defenses  
8 that the work of a simple discovery in a simple case did not  
9 provide. And I believe that the extent to which they are  
10 interested in this very proposition was not brought to the  
11 Court's attention with sufficient clarity.

12 We are left in the position that if the subpoenas are  
13 to go forward, we'll have to move to disqualify Bates White --  
14 I don't know, obviously, with what outcome, but we'll feel  
15 compelled to do that.

16 THE COURT: You mean, before me or some other  
17 litigation where that other court is the battleground at the  
18 time for the asbestos wars?

19 MR. SIMON: Admittedly, I don't have the precise  
20 answer to that. And I'm deferring to Mr. Swett on that point.  
21 I don't know the procedural components about how that should be  
22 pursued. I'm simply saying that it seems to us that the  
23 conflict of interest is one that we simply need to try to  
24 illuminate in whatever means of -- the process provides.

25 THE COURT: Isn't a traditional means of illuminating

1 conflicts of interest by cross-examination?

2 MR. SIMON: The problem is, is that the disclosure  
3 itself is what gives them what they want. In other words,  
4 assume just for the sake of discussion, if I might, Your Honor,  
5 that down the road they're asked in cross-examination, well,  
6 how is it you now know that the so-and-so site is an Owens  
7 Corning site. And how is it you now know that claimants like  
8 that typically, over the broad section of 7500 claimants whose  
9 trust matters you've subpoenaed are going to get that much  
10 money from the bankruptcy system? The answer I would expect,  
11 which would be similar to an answer that was provided by Dr.  
12 Mullin in the Leslie Controls bankruptcy deposition, would be,  
13 gee, over the vast data sources that I have and the experience  
14 that I have and all the things I bring to bear in reaching my  
15 opinions, I don't know what the individual data source was.  
16 But I'm sure I learned it from lots of places and all of them  
17 are wholesome.

18 What I contend, Your Honor, is that even though the  
19 confidentiality order is precise and clearly drafted with care,  
20 it's not just that a confidentiality wall can't be effectively  
21 put in the mind of Dr. Mullin. Even with Dr. Mullin's best  
22 efforts and best intentions, if we simply grant them, down the  
23 road he really may not know exactly how it is he knows this  
24 information which is affecting the current tort system. But  
25 he'll know it just the same. And he'll use it just the same.

1 I have nothing further to add unless I can otherwise  
2 confer for just a moment to make sure that is so.

3 (Pause)

4 MR. SIMON: Thank you, Your Honor.

5 MR. PHILLIPS: Your Honor, Robert Phillips at the  
6 Simmons firm on behalf of the objecting claimants.

7 THE COURT: Your name again, please?

8 MR. PHILLIPS: Robert Phillips, Your Honor.

9 THE COURT: Phillips?

10 MR. PHILLIPS: Phillips, like the gas station chain.

11 THE COURT: Okay.

12 MR. BENTLEY: Your Honor, I'm sorry to interrupt.  
13 But the Phillips firm and the Simons firm from whom you just  
14 heard together filed a single pleading. I'm not sure it's  
15 appropriate for two of them to be arguing seriatim.

16 THE COURT: Mr. Bentley, have at any time in the  
17 history of the General Motors case, have I ever said that  
18 because Mr. Mayer speaks, you can't speak or because Mr. Miller  
19 speaks, Mr. Karotkin can't. I'm not going to take repetitive  
20 argument. But I'm not going to hoist lawyers around in that  
21 fashion.

22 MR. BENTLEY: Okay. Fair enough, Your Honor. I  
23 apologize.

24 MR. PHILLIPS: Well, I certainly won't cover the  
25 ground covered by Mr. Simon and I wanted to keep myself very

1 brief here. There's also -- there's the granular issue is a  
2 word thrown around in the pleadings and in the discussions  
3 about this. But there's also an overarching issue. One unique  
4 facet which is alluded to in the reply by the unsecured  
5 creditors' committee to our objections is there's a relatively  
6 concentrated aspect to asbestos tort litigation. There's a  
7 limited number of law firms out there prosecuting claims on  
8 behalf of claimants. There's a relatively limited number of  
9 defense firms compared to the larger landscape of law firm  
10 practice everywhere in product liability.

11 What that means, Your Honor, is that information is  
12 especially at a premium because information disclosed about one  
13 or other parties or groups of parties has a significant impact  
14 because of the concentrated nature. For example, my firm was  
15 subpoenaed with roughly 1300 claimants out of the 7,000. I  
16 think it was 1296 sticks in my mind. I haven't looked at the  
17 number this morning -- which is a significant number of the  
18 number of claimants we've represented over the years. A large  
19 number of them have had settlements against GM, one might infer  
20 from that.

21 For that reason, Your Honor, if the UCC, and  
22 specifically Bates Whites that we're worried about here, is  
23 given information about our clients and certainly about such a  
24 large number and a large proportion -- and we represent  
25 approximately twenty percent of the mesothelioma clients in the

1 litigation. If he's given that information and will have  
2 substantial impact on the settlement process today with our  
3 claims and, as Mr. Simon and your colloquy mentioned earlier,  
4 it will have an effect in the future because there will be a  
5 substantial fill-in of the information gap which exists -- many  
6 of the exhibits attached to various pleadings in this matter  
7 are articles written by either Charles Bates or Charles Mullin  
8 about the asbestos tort system. There's one called "Show Me  
9 the Money". There's another one, "Having Their Cake and Eat  
10 it, Too" is a very close paraphrase of the title, in which  
11 Bates Whites has attempted to close the circle on information  
12 and say this is what we think the average asbestos mesothelioma  
13 claim is worth in the tort system. And they go through and  
14 they look at SEC reports and they rely on the information they  
15 know from the clients they represent despite the fact that  
16 presumably that information is confidential. But they use it  
17 for purposes of preparing these articles. The big gap in their  
18 information, Your Honor, is the bankruptcy trust. And they say  
19 as much expressly in these articles. And what this is today,  
20 the concentrated effort by Bates Whites and the people they  
21 represent to close that gap of information, square the circle  
22 and find out what people make -- and as I said, Your Honor, it  
23 makes a difference to know about firms and about types of  
24 claims because they want to know ideally what do Simmons firm  
25 clients get because they're twenty percent of the litigation.



1 If we know that this is what they're getting, combined with  
2 what we already know, we're going to be in a substantially  
3 improved position to negotiate with them. If we know what the  
4 Simon Eddins firm, Mr. Simon up here earlier, which is prone to  
5 take verdicts more often than many firms, they're going to be  
6 in a substantially improved position to know whether or not to  
7 risk verdict. That has to do with the law firms, Your Honor.

8 And as was alluded to by Mr. Simon, there's an issue  
9 about types of claimants. One of the things that's being  
10 talked about in litigation now is perhaps a slight shift from  
11 the welders and insulators and heavy industry workers of the  
12 first wave of litigation with a lot of take-home cases,  
13 construction trade cases and such that are becoming more  
14 prevalent in the litigation. For that reason, knowing the kind  
15 of trust claims being made by categories or buckets of  
16 people -- the average take-home woman gets this; the average  
17 insulator who still exists in litigation gets that. And Your  
18 Honor may say that the confidentiality protocol that's been  
19 agreed to by the parties that were here earlier in the case  
20 seems to protect against that. I would say it does not,  
21 however, Your Honor, because while certain steps and better  
22 steps can certainly be taken to protect the information at a  
23 very, very low level, granular level, nothing can erase, could  
24 possible erase, from the minds of Charles Mullin and Charles  
25 Bates, big picture items about firms and how well they do or

1 about buckets of categories. You know, one would say there's a  
2 half dozen to ten different types of general buckets of  
3 claimants who come across the desk of defense firms'  
4 litigation, remembering, well, this group gets this much money  
5 and this group knocks the ball out of the park with regard to  
6 the trusts is crucial information and will have a substantial  
7 impact, Your Honor, on the tort system. It will affect  
8 settlement, it will affect the number of trials because if the  
9 plaintiffs' firms face increased resistance by defense firms  
10 and by companies' litigation based on this sort of information,  
11 it will force the hand of plaintiffs' firms to fight back, to  
12 try more cases and all we hear, Your Honor, is about the  
13 overburden tort system and the needless use of trials in these  
14 matters and forcing firms to go to trial over and over and over  
15 to counteract the disclosure of information that, in this case,  
16 isn't going to be proven relevant 'cause it's not admissible at  
17 trial anyway -- but I won't relitigate the 408 arguments, Your  
18 Honor -- seems like a pointless and dangerous tact to take.  
19 Given the fact that Bates Whites has never done an estimation  
20 with this sort of information, there's been no track record of  
21 it even being useful, I fail to understand why Your Honor is  
22 risking the opportunity to substantially impact the tort  
23 litigation and to change the landscape of asbestos tort  
24 litigation for the sake of this argument. Thank you, Your  
25 Honor.

1 THE COURT: All right. Are there any other  
2 objectors? Mr. Swett?

3 MR. SWETT: Your Honor, may I be heard?

4 THE COURT: Yes.

5 MR. SWETT: Good morning, Your Honor. Trevor Swett,  
6 Caplin & Drysdale, for the official committee of asbestos  
7 claimants. Your Honor, I have two propositions. One is that  
8 if we took ourselves back to August 9th of this year when you  
9 first heard argument on the 2004 application, the revelations  
10 that have come to light about Bates Whites entrepreneurial  
11 branch, as I would characterize it, the Litigation Resolution  
12 Group, would have cast a different light on the stated need for  
13 the information, on Your Honor's evaluation of the balancing of  
14 all the factors that go into delineating the proper scope of  
15 discovery for the aggregate estimation particularly under the  
16 time constraints that the debtor is operating under and that  
17 the rest of us are straining to meet. It would have  
18 introduced a factor completely different than any other expert  
19 in that the Litigation Resolution Group had an undisclosed  
20 active interest in seeking out asbestos liabilities to take  
21 upon itself, in order to speculate, that the values will come  
22 down and it would be making money between the bid and the ask  
23 in the tort system. That's a material fact that wasn't in your  
24 view, it wasn't in my view, perhaps wasn't in Mr. Bentley's  
25 view when those issues were first aired. And I contend that

1 they would have had a significant impact.

2 Second, asbestos in this case is not the factor that  
3 it is in most cases where there are significant estimation  
4 proceedings. In this case, there are twenty-seven billion  
5 dollars of bond debt. The asbestos liability is certainly not  
6 the 800 pound gorilla in the room. And yet, for reasons that  
7 remain obscure to me, the UCC has lent its case, in effect, to  
8 Bates White for Bates White's quest to create an unparalleled  
9 unique fund of information bearing on the tort system.

10 This is not the appropriate case in which to  
11 experiment with radical innovations in the methodology of  
12 asbestos forecasting and estimation in the aggregate for plan  
13 formulation purposes. This is a case where that process, as  
14 Mr. Karotkin has continually urged, should be straightforward.  
15 It should be a matter of informed expert testimony within the  
16 limits of reasonably available information.

17 Another reason why it shouldn't be necessary in this  
18 case is that it is an aggregate estimation. We shouldn't  
19 trigger the due process rights of individuals to come in and  
20 concern themselves with this process. And it is, I think,  
21 clear from the arguments made by the tort counsel that,  
22 unwittingly, Your Honor's 2004 application does threaten  
23 significant impact on the tort litigation which is  
24 diametrically the opposite of what you set out to prevent when  
25 you ruled on August 9th that you would entertain procedures for

1 ensuring that the claimant specific information that would come  
2 forth in this case for estimation purposes not leak out into  
3 one on one claim liquidation proceedings, be they in other  
4 bankruptcies, in this bankruptcy or in the tort system. That's  
5 the goal you set. It does reflect your appreciation of the fact  
6 that the bankruptcy process is not supposed to distort the  
7 applicable nonbankruptcy law. So it is a fundamental  
8 structural point and it's an important one. And it has  
9 warranted Your Honor's patience with these proceedings 'cause  
10 the issue is complicated and it affects many people who are not  
11 in this courtroom or who have appeared in this courtroom only  
12 pursuant to the limited opportunity to argue to you about their  
13 view that the protections that you have tried to carefully  
14 design are not sufficient for the purpose. Given that one --  
15 the party that is to receive the claimant specific information  
16 has an active interest in opposing those claims in the tort  
17 system for its own financial gain which puts it in a position  
18 completely unlike that of any other expert. It's not a mere  
19 expert; it is a venturer in the tort system and its venture was  
20 not previously disclosed.

21 I assure Your Honor that if -- moving now from August  
22 9th to October 22nd -- had I known that Charles Mullin, who was  
23 in the courtroom and prepared to testify why the anonymity  
24 protocol that we had proposed involving a neutral which would  
25 have prevented Bates White from receiving claimant specific

1 information and given them only anonymized information at an  
2 aggregate level, he was prepared to testify to you why that  
3 would have crippled his estimation process. Now, Your Honor,  
4 by that time, was signaling some impatience, understandably,  
5 with the details of this issue. And the combination of those  
6 two things persuaded me to accept a compromise under which --  
7 under the present anonymity protocol, the claimant specific  
8 details will go to that very Charles Mullin who is the chief  
9 entrepreneur of the Litigation Resolution Group --

10 THE COURT: Pause, please, Mr. Swett. Refresh my  
11 recollection as to the deal points of the final compromise. Is  
12 that what you were about to do before I interrupted you?

13 MR. SWETT: Let me see if I can recite, Judge. Under  
14 the anonymity protocol as agreed, and I would argue as agreed  
15 under false pretenses, the trusts are to produce the claimant  
16 specific information pertaining to each GM mesothelioma  
17 claimant who appears in their respective databases as a  
18 claimant against the several trusts. That information, in its  
19 raw form, within the agreed limits of the data fields that are  
20 to be produced, goes to Bates White. Bates White, under that  
21 anonymity protocol, which I'm not calling into question, has  
22 the privilege of linking that data to any other data set it has  
23 and is available for its use in order to build more data  
24 concerning the same claimants. At that point -- that is  
25 supposed to be a separate and discreet database combining all

1 this what we'll call matched data. At that point, it's  
2 supposed to put aside the raw production of the claimant  
3 specific trust details. And Your Honor ruled that that  
4 production would not be subject to subpoena by any other  
5 persons for any other reason. It would just sit there  
6 available to Bates White and the other experts to defend their  
7 matching process or to attack some other expert's matching  
8 process if they went through that sort of thing. And then the  
9 other discreet matched database would be stripped of certain  
10 identifying details and the experts' analyses for the  
11 substantive purposes of the estimation and their reports and  
12 their exhibits would be generated based upon that anonymized  
13 data set.

14 Now, I must tell you that that was not, even at that  
15 time, a happy result for us because the experts were clear that  
16 in the right hands with the right computers and the right  
17 algorithms, they could easily reverse engineer and figure out  
18 exactly who those supposedly anonymized data points pertain to,  
19 at least within the contours of certainty that would suffice  
20 for their purposes. But we had to accept that compromise  
21 because of the lay of the land as it then stood including the  
22 fact that Dr. Mullin, with his undisclosed commercial interest  
23 in exploiting this information for other purposes, was prepared  
24 to come and testify to you putting on his hat as an expert why  
25 it would distort his methodology not to give him this claimant

1 specific information even though Bates White has made  
2 innumerable estimations on behalf of bankruptcy parties and on  
3 behalf of financial reporters with SEC obligations that have  
4 never concerned themselves with this level of claimant specific  
5 detail over the course of a couple decades.

6 This is an innovative push on their part and it  
7 didn't stop here. And this, too, I think would have put a  
8 different light on matters back in August had you been made  
9 aware of them. Bates White has persuaded other cooperating  
10 bankruptcy parties citing your August 9th decision as precedent  
11 to issue 2004s in their own cases seeking the entire databases,  
12 lock, stock and barrel, of every asbestos trust ever created.  
13 That's going on in the Bondex case and that's going on in the  
14 Garlock case, both Chapter 11 asbestos driven bankruptcies  
15 unlike this one.

16 Now, I am not suggesting to you that you should  
17 concern yourself with whether or not those applications get  
18 granted. However --

19 THE COURT: You mean, in Bondex and Garlock?

20 MR. SWETT: In Bondex and Garlock. We understand  
21 you're dealing with your case. But your precedent has been  
22 cited there and it does illustrate two things: the spillover  
23 effects from your decision which I would contend was made  
24 without the benefit of some material disclosures that should  
25 have been made; and second, the ambitions of the Bates White



1 firm vastly exceeding anything that any other expert has ever  
2 attempted to do in terms of gathering in one place the universe  
3 of claimant specific information about asbestos claimants.

4 Now, Dr. Mullin and Dr. Bates have specifically noted  
5 in their publications that in the tort system, everyone,  
6 plaintiff and defendant, operates under limits of information.  
7 Nobody has the full picture. The plaintiffs' lawyers know what  
8 they get for their clients from particular defendants. Those  
9 defendants know what they pay. They jealously guard their  
10 settlement information from all other defendants. It is a  
11 pervasive practice in the tort system that the settlements are  
12 confidential. The only way the settlement numbers come forth  
13 is when a defendant takes a verdict and then says I'm entitled  
14 to measure my offsets. And at that point, in a one-off, case  
15 by case basis, the plaintiff is obliged under local practices  
16 that vary throughout the country to come forth with the amount  
17 of money he's received from settling defendants so that that  
18 defendant doesn't pay more than its share. That's a discreet  
19 narrow window and very, very few asbestos cases go to trial,  
20 less than one percent. It's a settlement system; it's not a  
21 trial system. And the settlement system has as one of its  
22 fundamental facts the disadvantage to all that they operate  
23 without complete information as to what the other guys is  
24 paying.

25 Now, if in the tort system, General Motors had said,

1 General Electric, Georgia Pacific, Foster Wheeler, Union  
2 Carbide, you solvent asbestos defendants, here's a subpoena,  
3 give me all your settlement information. Well, why? Because I  
4 want to know it when I decide how much to pay for a claim.  
5 That would have been laughable in the tort system. It wouldn't  
6 have been entertained for a moment. Yet, these trusts stand in  
7 for former defendants. They are, in effect, co-defendants.  
8 And the substance of GM's demand, through the UCC, lending its  
9 good offices to the ambitious Bates White/Litigation Resolution  
10 Group firms is precisely that. Give me all your settlement  
11 information so I can decide how much I would pay if I were  
12 still in the tort system. Perversely, we are required in this  
13 case, as a matter of doctrine, to estimate what it would cost  
14 General Motors to resolve all its asbestos claims in the tort  
15 system were there no bankruptcy. That's the mission for plan  
16 formulation purposes, to decide how much of the estate goes to  
17 the trust. Well, in order to do that, based upon their  
18 ostensible needs, without disclosure of their ulterior  
19 commercial interests, they have persuaded the Court to give  
20 them discovery that they could never get in the tort system,  
21 that they have complained in print is not available to parties  
22 in the tort system, and where they have an active interest in  
23 cultivating a position as a defendant in the tort system. They  
24 are seeking to create unilateral advantage. No one else has  
25 it. And they are seizing on the bankruptcy cases for that

1 purpose. I submit that is a fundamental perversion of the  
2 bankruptcy process.

3 And it cannot be prevented, despite all due care,  
4 through the confidentiality agreement or the anonymity  
5 protocol. Because you can't lobotomize Dr. Bates and Dr.  
6 Mullin when they see the patterns, when they work with the  
7 data, when they form their impressions. So that when Dr.  
8 Mullin, in his other capacity, should he get a book of business  
9 of asbestos claims to manage for his own firm's profit, sits  
10 down with a plaintiff's firm to negotiate a settlement, nothing  
11 in the anonymity protocol or the confidentiality agreement will  
12 prevent him from using in his mind and in his strategy and in  
13 his approach to the settlement, the information and the  
14 patterns emerged from it, and the knowledge gained from it, all  
15 as a result of GM's liquidation. What an ironic, perverse  
16 situation to have created through a bankruptcy.

17 It wasn't your intention. And I contend that had the  
18 matter been fully spread on the record before you in August,  
19 based on full and fair disclosure, and all of the other  
20 considerations being brought to bear, you would have come out  
21 differently. There's another reason I say that.

22 We have had, over the last month, a hearing in  
23 Garlock that has involved testimony by the experts, as a  
24 preliminary matter, to decide how that case would be  
25 administered from the standpoint of the asbestos claims. Quite

1 unlike that case -- I should say, quite unlike this case, that  
2 is a bankruptcy driven entirely by asbestos. There are  
3 essentially no commercial creditors.

4 Now, Dr. Bates took the stand and testified on a  
5 couple of different occasions. And in the end he gave what I  
6 consider to be a very important admission for Your Honor's  
7 purposes. And I define that as figuring out what the heck to  
8 do to push this estimation forward within the limits of the  
9 available time here, with fairness to all parties.

10 And this is his admission: For the purposes of  
11 aggregate estimation, as opposed to figuring out, as he wants  
12 to do in Garlock, which claimants are old and stale and have  
13 abandoned their claims or never had one in the first place, and  
14 so they really shouldn't vote -- as opposed to that claimant's  
15 specific inquiry, for the purposes of aggregate claim  
16 estimation for plan formulation purposes, a sample is enough.

17 Here is the testimony. It appears on page 848 of the  
18 transcript of October 28th in the Garlock case. He first --  
19 when first confronted with the question on sampling he referred  
20 to the question of whether the information is expensive to  
21 obtain. He then proceeded to say the following in response --

22 THE COURT: Mr. Bentley, you're standing without  
23 saying anything. What do you want?

24 MR. BENTLEY: Could I ask to have a copy of the  
25 transcript that counsel is reading from, Your Honor?

1 MR. SWETT: You can, but I don't have it at the  
2 podium. I'll show you briefly.

3 MR. BENTLEY: Your Honor, this is a little unfair. I  
4 haven't had a chance to read it. This is a little unfair to go  
5 into this --

6 THE COURT: The facts -- Mr. Bentley, I'm going to  
7 give you a chance to be heard. But the facts that are -- I'm  
8 hearing about for the first time today, are a matter of concern  
9 for me. Maybe there's a satisfactory answer for it. But  
10 there -- fairness issues go in both directions, and they're of  
11 many different types. And I'm looking forward to your  
12 explanation as to how I didn't hear about this guy investing in  
13 this litigation, if those allegations are true.

14 MR. BENTLEY: I'm looking forward --

15 THE COURT: Now, what your opponents say is not  
16 testimony. But I assume that when lawyers make representations  
17 to me I'm getting accurate facts. If I have to have an  
18 evidentiary hearing, I will. But I got a problem here, Mr.  
19 Bentley. So don't talk to me about fairness unless we talk  
20 about the totality of the fairness.

21 Read it. Mr. Swett is going to finish. Then he's  
22 going to hand you that transcript. And then you can make such  
23 points as you see fit. And if you need a continuance to  
24 respond, then I'll do it. But I got to tell you, this is a  
25 matter of concern to me. Do I make myself clear?

1 MR. BENTLEY: You do, Your Honor. And I'm looking  
2 forward to responding, because I think what you've heard rests  
3 on a lot of inaccuracies.

4 THE COURT: Very well. Give him -- read the  
5 transcript; give it back to Mr. Swett; and then when Mr. Swett  
6 is done, he's going to give it to you and I'll take a recess to  
7 enable you to read it more thoroughly if you find that  
8 necessary or appropriate.

9 MR. SWETT: Thank you, Your Honor. In Garlock, the  
10 Bates White firm is the proponent of large data-gathering  
11 exercise that the committee that I represent opposes. And two  
12 rationales are given for it, one of which is irrelevant to this  
13 case, the other of which is quite directly relevant to this  
14 case, and that is the issue of when co-defendants settle, do  
15 they have a fair approximation in mind of what their several  
16 share of the asbestos liability is, given that most of the  
17 claimants have claims against many different defendants.

18 On that particular issue, at page 848 of the  
19 transcript of October 28th, counsel for the legal  
20 representative of future claimants asked this question:  
21 "Right. But forgive me, what information you get from the  
22 trust and what you do with it isn't an issue. We are focused  
23 now on the proof of claim and whether you can ask for a limited  
24 sample, rather than requiring 15,000 claimants to give detailed  
25 information. And as I understand your testimony, that is

1 something you could do, correct?"

2 Here's the answer: "From a valuation standpoint on  
3 the aggregate class, yes." Then he goes on to say, "From the  
4 standpoint of knowing which individual claims would have -- I  
5 mean, I think it would certainly help. A sample could be used  
6 to help resolve the issue over how many were stale claims and  
7 how many weren't. It would bring forth information on how many  
8 wouldn't, but I don't know how you resolve the information  
9 through that sample on which claims are which."

10 He's referring there to the issue that's not relevant  
11 to GM, which is supposedly old, cold, stale, invalid, non-  
12 malignant claims, as opposed to the estimate of the aggregate  
13 liability for mesothelioma, for which he says, from a valuation  
14 standpoint on the aggregate class, which is what we're  
15 concerned with in this case, Judge, yes, sampling suffices.

16 Now, the reason that matters is because as part of  
17 their 2004, you may remember, one branch was addressed to the  
18 trust and another branch was addressed to New General Motors.  
19 And Bates White drew a statistical sample of 650 litigation  
20 files. And New GM called upon all that defense network out  
21 there to muster their resources and pull those 650 files and  
22 give them to Bates White for whatever purposes it wants to use  
23 them for. And it has those files and has had them now for  
24 months.

25 Moreover, the legal representative has drawn a

1 similar sample, also of 650 litigation files. We, the asbestos  
2 claimants' committee, regard the individual files as completely  
3 irrelevant to the aggregate estimation, so we haven't drawn  
4 one. But they're welcome to use those for the sampling  
5 purposes and statistical extrapolation that is consistent with  
6 the purposes of an aggregate estimation. Had we gone that  
7 route exclusively, we wouldn't be here today having triggered  
8 the due process rights of many, many thousands of individual  
9 claimants who now must concern themselves with this proceeding.

10 Now, given that sampling is adequate by Dr. Bates'  
11 own admission, for an aggregate estimation; given that sampling  
12 would not require the production from third parties as opposed  
13 to from GM of vast amounts of confidential settlement  
14 information that wouldn't be available to GM in the tort  
15 system, it seems to me, especially when weighed in the context  
16 of the desired timeline in this case and the need to have an  
17 estimation quickly, one of its virtues being that it can be  
18 done quickly and thus can prevent unreasonable delays in plan  
19 formulation, we ought to go there.

20 And had you had Dr. Bates' admission in front of you  
21 in August instead of hyperbolic contentions about the great  
22 need, the indispensable need, for this claimant-specific  
23 information that Dr. Bates never got over twenty years of  
24 making estimations, including for investors to rely upon in the  
25 capital markets, well, I think we would have gone there. I



1 believe it would have presented itself to you in a different  
2 light.

3 Now, to save time, as the ACC regards this all as a  
4 great fuss; inevitably has to be fought through if the program  
5 doesn't change; there must be appeals; there will be stay  
6 requests. And we have also --

7 THE COURT: Appeals of what? Stay requests of what?

8 MR. SWETT: Your Honor, the committee feels  
9 constrained to take this issue up if we are unsuccessful in  
10 persuading Your Honor that the 2004 and the anonymity protocol  
11 should be --

12 THE COURT: What issue up? A discovery dispute?

13 MR. SWETT: The fundamental question of whether the  
14 discovery here improvidently affects the tort system. But I  
15 don't wish --

16 THE COURT: I lost you, Mr. Swett. I've been a judge  
17 for ten years and I've been a lawyer for forty. I've never  
18 known an appeal of a discovery dispute.

19 MR. SWETT: Your Honor, my contention is that this  
20 particular discovery dispute, relating as it does to the Bates  
21 White firm's goal of tilting the table in the tort system,  
22 contrary to your stated goal, is something more than an  
23 ordinary discovery dispute. But I accept the difficulties of  
24 the situation, if we come to that.

25 My effort now is to persuade Your Honor that you

1 didn't have in front of you the full information you needed to  
2 make the right call here. But there is still an opportunity --  
3 first let me explain that we have found it necessary, if we're  
4 going to face this claimant-specific information in the hands  
5 of Bates White, for the purpose of their arguing that the  
6 dominant factor in the tort system that explains GM's claim  
7 values and the pattern that emerges over the last few years  
8 outside of the bankruptcy court in GM settlements, is the onset  
9 of trust settlement payments -- that's one of the rationales  
10 you were given. If we're going to be forced into that  
11 artificial debate, as though the whole tort system could be  
12 reduced to the dynamic between one defendant's settlements and  
13 the resumption of pennies-on-the-dollar payments from trusts  
14 standing in for formerly paying but now bankrupt defendants,  
15 then we need to expand the lens.

16 And in that scenario, we would press for the  
17 settlement data of solvent co-defendants to examine those  
18 patterns in a more realistic way. We don't want to go there.  
19 We don't think it's the right thing to do. But we must meet  
20 what they are permitted to do. Now --

21 THE COURT: Let me get this straight. And you're the  
22 guy who's standing up there. Bentley's going to be standing up  
23 in a minute, and I have equal problems from both of you.

24 I have thousands of innocent GM creditors who are  
25 waiting for their distributions, and this is not an asbestos-

1 driven case. And this effort by the two of you to move the  
2 asbestos wars into my courtroom and to fight your respective  
3 agendas here, and then to take the results of them elsewhere,  
4 has the potential, if not the certainty of delaying  
5 distributions to literally thousands of innocent creditors.

6 What am I missing?

7 MR. SWETT: Your Honor, we don't want that to happen.  
8 And I'm about to offer an alternative. I've offered the  
9 alternative of sampling, which they already have the means for  
10 already in the discovery that they have received from General  
11 Motors. You could direct Bates White to conduct its analysis,  
12 to the extent it feels the need to descend to the level of  
13 claimant-specific information. It can do that based on the  
14 sample, subject to the constraints of the confidentiality  
15 agreement and order, and to the extent applicable, the  
16 anonymity protocol.

17 But in addition, precisely because we do not want to  
18 be in the position of standing in front of an oncoming train  
19 freighted by many thousands of innocent creditors who just  
20 don't happen to be asbestos creditors, but have their  
21 entitlements too -- we don't want to be in that position -- and  
22 regard this discovery as completely beside the point, so here's  
23 what we offer. We would offer a stipulation that every General  
24 Motors mesothelioma claimant, full stop, has received or would  
25 be entitled to receive, from each of the respondent trusts, the

1 published average compensation for mesothelioma as set forth in  
2 that trust's trust distribution procedures, which are a plan  
3 document approved in their respective bankruptcy cases.

4 Now, to unpack that a little bit. Dr. Bates has  
5 taken to offering opinions in the tort system on what  
6 particular tort claimants would receive from trusts should this  
7 defendant take a verdict so they can compute offsets that way.  
8 Those reports haven't yet been received in evidence. No court  
9 has granted them. But that's their methodology now.

10 THE COURT: Say that slower, please, Mr. Swett.

11 MR. SWETT: Okay. Dr. Bates offers in the tort  
12 system an opinion as to what particular tort claimants will  
13 receive from various bankrupt trusts. Here's how he does it.  
14 He takes the discovery material --

15 THE COURT: Particular tort defendants?

16 MR. SWETT: I'm sorry -- a particular tort plaintiff  
17 would receive by way of compensation from the different  
18 bankruptcy Section 524(g) settlement trusts. He wants the  
19 defendant to be able to go in front of the jury and say, this  
20 claimant isn't deserving of any further compensation; he has  
21 received a million dollars from a combination of trusts or will  
22 receive in the future.

23 I footnote, no court has been willing so far to  
24 accept that testimony, but he writes these reports.

25 THE COURT: No bankruptcy court with the estimation

1 power or no court in any plenary litigation?

2 MR. SWETT: No tort suit, Judge. No court presiding  
3 over a tort suit, which is where these opinions are offered.

4 Now, we will give him the substantial equivalent.  
5 Because what he does there is he takes the discovery documents  
6 from the particular case and he says, well this guy worked at  
7 such and such a place and he was a pipefitter, and he changed  
8 jobs and worked for these other employers at these other  
9 locations. And we know from the published approved site lists  
10 that some defendants who are bankrupt put out on their trust  
11 website, we can link him to those people's products at these  
12 various sites, and that'll give him a claim against these  
13 trusts. And we will assume that he will get the scheduled  
14 value which is set forth in the trust distribution procedures.  
15 And he'll add them all up, and he'll say, this fellow would  
16 receive 850,000 dollars all in from the other trusts before the  
17 jury even considers what this tort defendant should now pay  
18 him.

19 Well, we offer to stipulate for the purposes of  
20 saving time and narrowing the issues, and solely for the  
21 purposes of the estimation proceeding in this case, a  
22 stipulation. Bates White can assume for purposes of its  
23 aggregate estimate that every one of the 7,400 mesothelioma  
24 claimants who sued GM had other exposures for which these  
25 respondent trusts are now responsible. He can assume that.

1 And he can also assume that each one of them received the  
2 average mesothelioma payment, which is a scheduled amount that  
3 the trusts set forth in their respective trust distribution  
4 procedures.

5 That is a number that the trusts set as their goal  
6 for ensuring that whether a claimant submits his claim for  
7 expedited review, as it's called, where there are certain  
8 presumptive criteria, and if you meet them you get X dollars;  
9 or individual review, where you say, no, no, my claim is worth  
10 more than X dollars, I want you to look at the particulars of  
11 my claim trust, and if I win, I want you to pay me more than X.

12 Well, the trust, because of that variable, the  
13 unknown as to how those individual reviews are going to come  
14 out, sets itself the goal, it must not pay in the aggregate  
15 more than the average mesothelioma value that it publishes in  
16 its TDP, lest it run out of resources to pay other people  
17 fairly.

18 THE COURT: Pause, please, Mr. Swett. Because I  
19 understand the higher and lower aspect of what you just told  
20 me. But where I'm confused is getting my arms around the  
21 uncertainty as to which the universe of GM asbestos claimants  
22 would have claims from all, none, or something in between of  
23 the various trusts out there.

24 MR. SWETT: You can only determine -- no one knows  
25 that answer. You can only determine it by the kind of

1 discovery he now wants that he doesn't get in the tort system.  
2 Because in the tort system, he's left to draw inferences based  
3 upon evidence. Here he wants something no tort defendant has  
4 ever gotten, he wants the co-defendant settlement information.  
5 And he will draw inferences from that.

6 Well, we're making it easy for him. He can assume  
7 product exposure on the part of every GM mesothelioma claimant  
8 with respect to each defendant for which these trusts now stand  
9 in. He can bring to bear the --

10 THE COURT: Whether or not they in fact worked for a,  
11 or were present at a facility, where that trust might be within  
12 the target zone?

13 MR. SWETT: We give him that stipulation to narrow  
14 the issues. It is something that we intend to be binding only  
15 here. It's simply a concession to the shortness of life and to  
16 the need to get on with this estimation. It's an econo -- he  
17 doesn't concern himself in the end with the nitty-gritty  
18 individual details. He's told you that himself. He is driving  
19 here towards an aggregate estimate. We disagree with the  
20 emphasis he places on the granular details. But we'll give it  
21 to him in the form of an issue-narrowing concession, that he  
22 can draw the economic inferences on the basis that every GM  
23 claimant had exposure to these other defendants' products and  
24 would get what those trusts can only pay on average. If they  
25 paid more than that, they'd go bust too. And their own plans

1 of reorganization and their mandatory provisions of their TDPs  
2 prevent it.

3 That's as good as it gets for Charles Bates in the  
4 context of this estimation; in the context of this liquidating  
5 11 where asbestos is not the major factor and shouldn't consume  
6 inordinate amounts of time.

7 I submit to you, Your Honor, that if that concession  
8 isn't satisfactory, it only serves to underscore ulterior  
9 purposes on the Bates White's firm part. I also submit that it  
10 would be far better to finesse these complicated disputations,  
11 contentious and time-consuming issues in this case, and let  
12 them fight it out in Bondex. Let them fight it out in Garlock,  
13 where they seek the whole universe of trust databases. It's  
14 not an appropriate fight to consume resources and time in this  
15 case.

16 In short, Your Honor, I contend that had you known  
17 what was out there, unbeknownst to us, when you made your  
18 original 2004 ruling, and when you accepted the compromise that  
19 we made on the anonymity protocol, conceding the key point that  
20 the nitty-gritty client-specific information would go to Bates  
21 White, albeit under restrictions -- we gave that up, because  
22 Charles Mullin was here to testify to you, without having  
23 disclosed to us his ulterior purposes. That's not a fair  
24 position for us to be in or for you to be in.

25 There's a cure for it. Because these issues are



1 really collateral in this case. And there is a shorter, more  
2 direct path to the estimation that everybody wants to conclude  
3 here.

4 Now, I would, if Your Honor would entertain it, I  
5 would like to file a brief tomorrow to put these things in  
6 writing, by way of seeking reconsideration and allowing  
7 opposing counsel the opportunity to respond if they care to do  
8 so. And I would be at their disposal in terms of how long they  
9 needed to fairly evaluate those issues. I'm not trying to ruin  
10 their Thanksgivings. We'll cooperate with them on matters of  
11 scheduling. But you need to see this stuff laid out in the  
12 light of day. And we are offering our efforts to put it before  
13 you.

14 Now, I should mention one thing that eluded my  
15 mention up to now in this discussion. This outfit, Litigation  
16 Resource (sic) Group, according to Dr. Mullin's recent  
17 testimony, doesn't presently have a book of business. But he  
18 also testified that they're out there looking and they hope to  
19 be successful. So it is no less material from that standpoint  
20 than it would be if they were already managing a portfolio of  
21 asbestos liabilities to take advantage of what they hope will  
22 be the decline in values. That is their aspiration. It is  
23 their commercial purpose. We submit it's what drives this  
24 agenda, which otherwise is completely perplexing to us in the  
25 context of this case, so remote is it from the issues you

1 really have to concern yourself with.

2 And we hope that the combination of Dr. Bates'  
3 concession in sworn testimony that I will give to Mr. Bentley,  
4 that for aggregate estimation a sample is enough; and the fact  
5 that he has already drawn a sample and already has those  
6 materials; and the fact that we offer in any event the  
7 stipulation that would take this issue completely off the table  
8 for the limited purposes of this estimation, should point the  
9 way to a better path towards a swift estimation so that we are  
10 not put in the unhappy position of having to insist on our  
11 clients' rights in the face of the oncoming train, of a much  
12 desired conclusion to this case. Thank you, Judge.

13 Unless you have questions for me, I'll stand down.

14 THE COURT: No.

15 Mr. Esserman, are you rising?

16 MR. ESSERMAN: Yes, I am, Your Honor. May I  
17 approach?

18 THE COURT: Yes.

19 MR. ESSERMAN: Sandy Esserman, for the record. I  
20 have nothing to add. I just wanted to make sure that I put my  
21 marker in. I'm generally supportive of what I heard today; a  
22 little surprised by some of it. And we look forward to  
23 reviewing any proposed stipulation in writing. Thank you.

24 THE COURT: What does that last thing mean, Mr.  
25 Esserman? Does that mean that if, although the asbestos

1 committee were prepared to agree with it, the future claimants  
2 would not?

3 MR. ESSERMAN: I suspect we would, Your Honor. But  
4 I've got to run it by my expert. I haven't seen the proposed  
5 stipulation. It sounds like it probably would be something  
6 that we would agree to. But I do have a different expert, and  
7 he's not in the courtroom today, and I suspect he'll be fine  
8 with it also. But I just need to make sure that he is.

9 THE COURT: All right.

10 MR. ESSERMAN: Thank you.

11 THE COURT: Have I heard from everybody on the  
12 claimants' side?

13 Mr. Karotkin, I very much want to hear what you're  
14 going to have to say, but I think I want to hear from Mr.  
15 Bentley first.

16 MR. KAROTKIN: That's fine, Your Honor. I was hoping  
17 to go last anyway.

18 THE COURT: All right.

19 MR. SWETT: Mr. Bentley, I've got the transcript.

20 MR. BENTLEY: I'll look at it latter, thank you.

21 Your Honor, Mr. Swett has made a lot of very strong  
22 allegations. We -- let me say at the outset, we very strongly  
23 dispute them. And I'm going to attempt to show Your Honor that  
24 they rest on a lot of distortions if not outright inaccuracies.  
25 I take very seriously what he said. And I'm frankly a little

1 bit shocked by some of the things he said.

2 I believe the things he said, the principal points  
3 that we'd like to respond to, each of which we think is deeply  
4 inaccurate, fall into about four categories, depending on how  
5 you count. The first, he actually used the word "false  
6 pretenses"; that Bates White came to this court with false  
7 pretenses and snookered -- not his word, but a fair  
8 paraphrase -- snookered this Court, snookered him and his  
9 clients. That is absolutely untrue. And I'd like to address  
10 that first.

11 Just to preview the other points, he also says that  
12 Bates White is unlike any other expert in that they have a  
13 financial stake. This is also untrue, Your Honor. In fact  
14 there are other parties involved in the asbestos litigation who  
15 have a much greater financial stake, who regularly have access  
16 to highly confidential information which they use in exactly  
17 the same way that he is accusing the Bates White firm of using  
18 it. That will be point two, Your Honor.

19 Point three is the suggestion that the anonymity  
20 protocol that the ACC negotiated -- and I would say with full  
21 knowledge of Bates White's business activities, which have  
22 always been public, have never been concealed; they're on the  
23 website. They regularly --

24 THE COURT: They haven't been public to me, Mr.  
25 Bentley.

1 MR. BENTLEY: Yes. And my apologies for that, Your  
2 Honor. But let me explain why. This is a -- this relates to a  
3 company known as Litigation Resolution --

4 THE COURT: Resources Group?

5 MR. BENTLEY: -- Resolution Group or LRG.

6 THE COURT: Litigation Resolution Group?

7 MR. BENTLEY: Correct, Your Honor. That is a company  
8 in which a couple of Bates White personnel have an interest.  
9 Charlie Bates, the lead person in this engagement and the  
10 person who I believe signed the retention application in this  
11 case, is not involved with LRG. That's why it didn't show up  
12 in our retention application in this case. Charlie Bates is  
13 not involved with LRG.

14 The lead person at LRG is Charlie Mullin -- there are  
15 two Charlies, Your Honor. Charlie Mullin has never appeared  
16 and may never appear as an expert witness in this case. And if  
17 he ever does, you can be sure we will disclose this and any --  
18 every other pertinent matter in connection with his testimony.  
19 And if he were to put in an expert report, you can be sure,  
20 this would be in the report. So that is one reason we didn't  
21 disclose it.

22 Another reason, Your Honor, is that -- I have to use  
23 strong words, Your Honor, because Mr. Swett used very strong  
24 words -- there has been a serious mischaracterization of what  
25 LRG does. And the suggestion -- it has been said that they

1 have an undisclosed commercial interest that is somehow  
2 different from interests held by other experts. That's not  
3 true, Your Honor. LRG is a startup company, as I think has  
4 been accurately stated. The hope of LRG is that they will be  
5 able, in some case, to find a party that has capital. They do  
6 not have capital, Your Honor. They do not put their own  
7 capital into deals. The suggestion was that they did. It  
8 wasn't stated, but that was the suggestion. They do not.

9 They receive a fee -- or their hope, if they ever do  
10 a deal -- they've never once done a deal, Your Honor. This is  
11 a startup that's hoping to do business. If they ever do a  
12 deal, the structure that's contemplated is they would receive a  
13 fee, much like any estimation expert receives a fee, when it  
14 does due diligence with respect to a proposed, say, merger or  
15 transaction involving a company with asbestos liabilities. The  
16 estimation expert would then be paid, perhaps hourly and  
17 perhaps also a success fee, if the transaction closes, for  
18 vetting the asbestos exposure of the company that's being  
19 looked up.

20 That's the sort of fee. That is exactly the sort of  
21 fee that if LRG ever got business, it would receive. That is  
22 no different, Your Honor, from the sorts of fees that the other  
23 experts in this case -- I can't say every single one of them,  
24 but certainly an awful lot of estimation experts regularly do  
25 this sort of due diligence work, and they're not just paid

1 hourly; they receive a success fee. So that's the only --

2 THE COURT: How is success measured?

3 MR. BENTLEY: Well, I believe -- when they're doing  
4 due diligence, I believe the standard practice is, it hinges on  
5 whether the transaction closes or not. And in LRG's case, it  
6 would simply hinge on whether the party that's coming in and  
7 supplying the capital in fact closes on the deal. They would  
8 then receive a fee -- a flat fee for putting the deal together.  
9 They are something as a broker. That's the way Dr. Mullin has  
10 described it to me. So that's quite different, Your Honor,  
11 from what I think was suggested to this Court.

12 And if one wants to ask, are there parties in this  
13 litigation world that in fact have a financial interest --

14 THE COURT: I still don't understand, Mr. Bentley.  
15 As I discussed in my recent published decision in Chemtura,  
16 so-called success fees can be of many different types.  
17 They're almost always relevant to the credibility of witnesses.  
18 The more difficult issue is whether they rise to the level of  
19 disqualifying the witness. And in Chemtura I said, I've been  
20 around the block a few times. I know enough about it, and it's  
21 enough for me to cause everybody to take a hit against  
22 credibility.

23 But one of the success fees was if that guy's  
24 constituency got more. Another guy's success fee was if the  
25 plan got confirmed. Another was if a plan satisfactory to the

1 creditors' committee got confirmed. The contingent interest in  
2 a constituency's recovery, I found to be the most egregious.  
3 But I further ruled that if, as I assumed, the success fee for  
4 a plan being confirmed or a satisfactory plan being confirmed  
5 wasn't simply a disguised way to pay investment bankers more,  
6 that that was another kind of incentivization.

7 Now, within those confines or otherwise, help me  
8 better understand the role of this guy's success fee. What is  
9 the event that measures success, and what is the guy doing, and  
10 what is the nexus between the two of them?

11 MR. BENTLEY: The most important point, I think, Your  
12 Honor, is in this case, in connection with Bates White's  
13 services in this case, there's no success fee whatsoever.

14 THE COURT: That isn't what I understood the  
15 allegation against Mullin to be. The allegation was that he  
16 was gathering up data to use in a private enterprise, unrelated  
17 to this case, in which he would be making a profit. Now, if  
18 that is an incorrect understanding of what I heard from Mr.  
19 Swett and from the two tort lawyers, correct me. But please  
20 tell me the facts as you understand them.

21 MR. BENTLEY: And first, Your Honor, what you just  
22 summarized, I think, is an accurate summary of what you heard  
23 from Mr. Swett. So I may have not been fully clear. I'm  
24 trying to distinguish between two things, Your Honor: first,  
25 is he receiving any success fee from the creditors' committee



1 in this case --

2 THE COURT: I understood that from the get-go, but  
3 that wasn't --

4 MR. BENTLEY: Okay. The answer is no.

5 THE COURT: -- the allegation that was being made  
6 either.

7 MR. BENTLEY: Okay. So let me turn to that, Your  
8 Honor. And I'm pausing a little bit, because the allegation is  
9 about transactions that haven't yet occurred. And so we are,  
10 all of us, speculating as to what the fee might be. But what I  
11 can represent to Your Honor, is what Dr. Mullin has represented  
12 to me about what he contemplates the success fee would be if  
13 LRG were to ever get business. And his contemplation is that  
14 if a deep-pocketed institution comes to him and essen --

15 THE COURT: An institution that is going to fund him  
16 or an institution that's the target of litigation?

17 MR. BENTLEY: The basic model, Your Honor, is if you  
18 have a defendant that say, is in bankruptcy -- or might be  
19 outside of bankruptcy, that the basic idea is that they would  
20 offload their asbestos liabilities to Warren Buffet, just to  
21 pick a name as an example -- to Warren Buffet or some other  
22 financial insti -- an institution run by him or some other  
23 financial institution. And this institution, let's call it  
24 Warren Buffet, would essentially insure the asbestos  
25 liabilities.

1 Very different from most asbestos insurance which was  
2 granted way back before people knew there was an asbestos  
3 problem. This is asbestos insurance offered right in the  
4 middle of the asbestos litigation. So it obviously would be  
5 much pricier than insurance purchased before people knew that  
6 it was a problem.

7 THE COURT: Kind of like a credit default swap for  
8 asbestos defendants?

9 MR. BENTLEY: I'm not sure if that's the right  
10 analogy, Your Honor. But it's essentially a new defendant --  
11 I'm sorry -- a new party coming in and saying whatever the  
12 liability is, we'll be on the hook for it. And you -- say, GM  
13 or W.R. Grace -- let's say W.R. Grace -- you, W.R. Grace, will  
14 pay us X billion dollars. And in exchange, whatever the hit  
15 turns out to be, we'll be good for it. And the financial  
16 institution would be hoping that the liability would come in at  
17 less. And the financial institution would be looking to Dr.  
18 Mullin and LRG for the advice on which it made that financial  
19 bet.

20 THE COURT: And your opponent alleges or at least  
21 implies that Mullin getting the data which he's going to use to  
22 advise people in making those financial bets, takes the data to  
23 which Bates White is being given access to a new purpose or a  
24 new level that facilitates the efforts in the asbestos wars,  
25 unrelated to the needs and concerns of this case.

1 MR. BENTLEY: That is the allegation, Your Honor.

2 And there's a number of big flaws in that allegation. I'm  
3 pausing for a second to think which I should address first.

4 THE COURT: Well, why don't you try addressing them  
5 all.

6 MR. BENTLEY: Certainly, Your Honor. Maybe let me  
7 just tick off the broad topics and then I'll turn in detail to  
8 whichever one Your Honor would like me to start with.

9 One problem is the suggestion that Bates White  
10 actually could do that. And we believe it's very clear that  
11 the confidentiality order that was heavily negotiated by the  
12 ACC and the trusts, and the anonymity protocol that Your Honor  
13 will recall was heavily negotiated by the trusts and Mr. Swett  
14 in the hallway of this courtroom -- that those would make it  
15 virtually impossible for Bates White to do what they're saying.  
16 And I'll explain.

17 But if I may, let me just mention the several other  
18 huge flaws here, so Your Honor gets the big picture as we see  
19 it. The other -- another huge flaw, Your Honor, is that the  
20 ACC, when they negotiated those protections that I just  
21 mentioned, that they didn't know that Bates White is engaged or  
22 hopes to be -- I'm sorry; strike that -- that LRG, in which one  
23 Bates White senior person, Dr. Mullin, and a few of his junior  
24 colleagues are principals -- that LRG -- I'm sorry, I lost my  
25 thread, Your Honor.

1 My point was that ACC was -- the ACC was well aware  
2 of the connection between Bates White and LRG at the time it  
3 negotiated these protections. And I say that for a couple of  
4 reasons, Your Honor. One is, Your Honor may be aware, there  
5 are regular conferences sponsored by HB and others -- it used  
6 to be Mealey's --

7 THE COURT: Who is HB?

8 MR. BENTLEY: HB is the successor to Mealey's. Does  
9 Your Honor remember the Mealey's Litigation Reporters? They  
10 sponsor conferences.

11 THE COURT: Mr. Bentley, since August 9th, I had a  
12 major contested confirmation hearing with a four-day trial, and  
13 I've had six billion dollar cases. You better refresh my  
14 recollection on the things that have transpired since August in  
15 the vocabulary and jargon you use --

16 MR. BENTLEY: Okay, I'm sorry, Your Honor. I know  
17 there is a lot of jargon in this case.

18 The point is not the name of who sponsors the  
19 conference, but there are regular conferences that are  
20 regularly attended by Bates White, by Dr. Peterson, by Joe  
21 Weiss, by lots of the major players in the asbestos litigation.  
22 They occur, you know, ten, twenty times a year. Bates White  
23 has been disclosing for many months, going back long before  
24 this summer, its -- the LRG business that some of its people  
25 are engaged in. Frankly, it's been pitching that business at

1 these conferences, attended by all the ACC's clients, and  
2 frankly, I would venture, attended by members of Caplin &  
3 Drysdale, because they regularly appear at these conferences.

4 Mr. Karotkin appears at these conference. I  
5 sometimes appear at these conferences. These are regular  
6 things and everybody goes. And Bates White has been regularly  
7 disclosing this.

8 In addition, something that Your Honor can take  
9 judicial notice of, is if you Google Charles H. Mullin -- I did  
10 that this morning -- the third hit you'll see is Charles H.  
11 Mullin/LRG. And if you click on the link, you get to one of  
12 the exhibits that's annexed to the Motley Rice/Peter Angelos  
13 objection. That's the objection that addresses these issues.

14 One of their very exhibits is pulled of the LRG  
15 website. And you or I or anybody can easily find it just by  
16 Googling Dr. Mullin. And if Your Honor likes, I'm happy to  
17 hand up -- I actually printed --

18 THE COURT: Mr. Bentley, do you understand how judges  
19 do their jobs? They don't go out Googling to find out  
20 information that might be discerned if any of the litigants  
21 before them chose to say something in court or in a brief.  
22 We're not free-roving inquirers to find out stuff that might be  
23 potentially relevant to the rulings we issue. In fact, some  
24 might regard that as textbook violation of due process.

25 MR. BENTLEY: Your Honor, my apologies if I wasn't

1 clear. I didn't mean to suggest for a moment that this is  
2 something Your Honor or your chambers should have done. But my  
3 point was that the ACC clearly put a lot of work -- you'll  
4 remember in August all the briefs that were filed -- clearly  
5 they and their counsel and the trusts' many counsel did a lot  
6 of work here. And it was the simplest of things for them to  
7 discover these facts, if they hadn't already known them from  
8 these conferences.

9 That was my point, Your Honor. Not to suggest that  
10 Your Honor should have discovered it, but that it is very clear  
11 that this is public information to which the ACC had ample  
12 access, and in fact, which they'd heard about directly at these  
13 many conferences and which they could have found on the web.  
14 That was my --

15 THE COURT: To what extent is Mullin walled off from  
16 access to this under the existing confidentiality stay?

17 MR. BENTLEY: He is a member of the team, Your Honor.  
18 But let me tell you how he's walled off --

19 THE COURT: The team that going to be appearing in  
20 the GM case?

21 MR. BENTLEY: The team that's doing the work that  
22 will support Dr. Bates' expert report and Dr. Bates' testimony.

23 But if I may, Your Honor, I'd like to tell you how  
24 he's walled off from the data that the ACC is concerned about.  
25 And there -- and my starting point, Your Honor, was, when the

1 ACC negotiated the protective order and the anonymity protocol,  
2 they were aware of this issue and they addressed it. And the  
3 anonymity protocol makes it essentially impossible for Dr.  
4 Bates or Dr. Mullin or anybody else to use the confidential  
5 information in the way they're suggesting.

6 And let me remind Your Honor what the basic  
7 provisions are that I'm referring to. First off, they make a  
8 commitment that they won't use any of the confidential data  
9 obtained in this case in any other capacity. So first off,  
10 we're trusting that they will honor their commitments. And a  
11 point I made a month or a few months ago is, there's never been  
12 any suggestion that they have ever done anything other than  
13 that -- that they've ever breached any commitment.

14 But beyond that, let's assume hypothetically -- and I  
15 do want to stress hypothetically -- that one didn't trust Bates  
16 White. Now, I know that the ACC is vociferously untrusting of  
17 Bates White. We think that's entirely unwarranted. We think  
18 there are reasons for that which I can mention if Your Honor  
19 wants to go there. But my point is, let's assume  
20 hypothetically that they were untrustworthy and that there were  
21 a reason to believe they wouldn't honor their commitments.

22 They couldn't use this data. And the reason is,  
23 there's a very rigorous process that was worked out and that's  
24 embodied in the stipulation that Your Honor so ordered back on  
25 October 22, last month, when we were last here before you. And

1 that provides that the individual specific data, names and  
2 Social Security numbers, is used only for one very limited  
3 purpose, and that is the matching of data concerning a claimant  
4 from one dataset with the data concerning that claimant from  
5 another dataset.

6 It's used -- the sensitive information, the name and  
7 the Social Security number, is used only for that purpose.  
8 Once the matching is completed, then the name and the Socials  
9 are stripped away. And they're put in a vault, essentially.  
10 And from then on, Dr. Mullin, Dr. Bates, everybody else, is  
11 working off what we call an anonymized database, which gives  
12 rise to none of the concerns that we're talking about.

13 So if we pause for a moment and imagine, this  
14 fantasy -- and I think it's just that, Your Honor, it's a  
15 fantasy. What would they have to do -- you know, if you  
16 couldn't trust them to honor their commitments, what would they  
17 have to do to breach their commitments? They'd have to  
18 memorize Social Security numbers and memorize the specific --  
19 claimant-specific information to which it relates. And we're  
20 talking as to seven and a half thousand individuals. It's  
21 nuts, Your Honor. It's a complete fantasy. And there's --  
22 it's completely unrealistic.

23 Let me turn Your Honor to a related point, and that  
24 is Dr. Peterson, the plaintiff's expert, regularly has access  
25 to data that's just like this, and he's under much less



1 stringent constraints. And he regularly admits that he uses  
2 that data in performing his estimations. That's something you  
3 didn't hear from the ACC, and that's a huge distortion in the  
4 picture that was presented to Your Honor.

5 Dr. Peterson, as was stated in his retention  
6 application to this Court, which I can hand up if it's helpful  
7 to Your Honor -- Dr. Peterson disclosed in his retention  
8 application that he's a consultant to twenty-six of the biggest  
9 asbestos trusts: Johns Manville -- practically every large  
10 asbestos trust that's been created in an asbestos-driven  
11 bankruptcy. He's a consultant to the trust.

12 As such, he has access to all the data we're talking  
13 about -- all the most sensitive data. He's not subject to any  
14 anonymity protocol. He then goes on and puts in his expert  
15 reports, he's going to put in an expert report in this case,  
16 and all these special advantages you heard that Bates White  
17 has -- this is perhaps the biggest fallacy of all, Your  
18 Honor -- there's no special advantage. Bates White is getting  
19 nothing that Dr. Peterson and the other experts in this case  
20 don't have. All of these experts routinely appear and estimate  
21 asbestos liabilities. They also routinely do due diligence  
22 works as to a company's asbestos if it's outside of bankruptcy.

23 In that capacity, they're exposed to all this data,  
24 Your Honor. And they're not subject to the stringent orders  
25 that, at Your Honor's insistence, were negotiated here. And

1 they go on and they use them in other cases. So Bates White is  
2 far more constrained than any of the other experts in this  
3 case.

4 And, Your Honor, if we're talking about financial  
5 incentive, this was another huge misimpression that was  
6 provided to the Court. Who has the real financial incentive  
7 here? The plaintiffs' law firms. As Your Honor knows, they're  
8 regularly exposed to all this data. They'll negotiate on  
9 behalf of hundreds if not thousands of claimants against, say,  
10 Owens Corning or W.R. Grace or any other defendant you can  
11 name. In each settlement, they're bound to not disclose the  
12 amount of the settlement. It's confidential. Just as the data  
13 here is confidential.

14 They then go on to negotiate settlements on behalf of  
15 other clients of theirs for which they receive a contingency  
16 fee of a third or sometimes thirty-five percent or more, for  
17 other clients. And just as you heard -- you know, Dr. Bates  
18 can't blot out of his mind what's he's learned, these  
19 plaintiffs' firms are bound to not use what they learned when  
20 they go on and negotiate settlements with the same defendant on  
21 behalf of other plaintiffs. But of course they can't blot it  
22 out of their mind. And of course, it's enormously valuable,  
23 because they know what each defendant's proclivities are, what  
24 each defendant is willing to pay. That's a financial  
25 incentive, Your Honor. They get thirty-five percent or thirty-

1 three percent of the take.

2 Bates White doesn't get anything remotely like that.  
3 They get paid -- I'm sorry. LRG, this bogeyman you've heard  
4 about, they don't get anything remotely like that. As I said,  
5 they don't have a direct financial stake. At most they get  
6 this flat fee for putting a transaction together. So the real  
7 party that has the financial stake is the plaintiffs.

8 Now, Your Honor, we haven't sought to disqualify  
9 anybody. We haven't said Dr. Peterson can't appear hear  
10 because he has access to all this confidential information,  
11 subject to much less constraint than Bates White; because we're  
12 content to assume that Dr. Peterson won't violate the terms of  
13 the confis that he's agreed to.

14 And if we turn back, Your Honor, to August, that was  
15 one of the central points Your Honor made. Your Honor said,  
16 for hundreds of years, a basic premise in the litigation system  
17 is people agree to confis, even when it's the Coke secret  
18 formula that's involved. We don't deprive them of getting the  
19 data. We assume that they'll honor their confi.

20 So we're prepared to follow that rule with respect to  
21 Dr. Peterson. And we submit that that in itself would be  
22 sufficient to alleviate any concerns that have been raised with  
23 respect to Bates White. But as I mentioned a moment ago, at  
24 Your Honor's insistence we've gone way beyond that. And we've  
25 entered into this elaborate anonymity proposal that strips them

1 of the ability to misuse this information.

2 Your Honor, if I may, I have one or two other points,  
3 if you can give me a moment to look at my notes?

4 THE COURT: Yeah.

5 MR. BENTLEY: Well, my final point I'll go into if  
6 Your Honor wishes, but I won't if Your Honor would prefer to  
7 move on. You heard extensive reargument --

8 THE COURT: Well, you can say what you want. What I  
9 mainly care about is hearing what Mr. Karotkin has to say,  
10 because perhaps, of the various parties in the room, his  
11 interests might be closest to mine in terms of getting on with  
12 an expeditious hearing and getting money into the pockets of  
13 creditors of all persuasions.

14 MR. BENTLEY: Okay. Well, let me be very brief, and  
15 then I'll cede the podium to Mr. Karotkin.

16 We share, by the way, his interest in moving this  
17 along quickly. And we were distressed by what we heard from  
18 Mr. Swett and by the filing they made, I think it was last  
19 week, in which they sought additional discovery which would  
20 exponentially slow down this proceeding.

21 We think that what's happened, Your Honor, is they  
22 are very, very distressed by the prospect of having to turn  
23 over this information. Mr. Swett argued there's no relevance.  
24 I can state the relevance of it very briefly and succinctly if  
25 Your Honor wishes. But the basic -- Your Honor, their central

1 contention back in August when they said this is not relevant,  
2 was they said the amounts that were paid by the trusts and co-  
3 defendants are not relevant because they were baked into the  
4 amounts that GM paid to the plaintiffs prior to its bankruptcy.

5 Our central contention, Your Honor, is a factual one,  
6 and that is, no, they weren't baked in. Because GM didn't know  
7 the payments that these plaintiffs were getting and GM didn't  
8 know the exposure allegations that these plaintiffs were making  
9 to the various trusts, which were inconsistent with the  
10 disclosures that were being made to GM.

11 And that -- if Your Honor -- if we get the discovery  
12 we want, if it shows that, that will have a fundamental impact  
13 on this estimation. It also explains, I think, why the ACC is  
14 so determined to not let us get this information and why, Your  
15 Honor, Mr. Swett didn't mention a few weeks ago, they actually  
16 made a motion in front of Judge Fitzgerald down in Delaware, in  
17 which they sought an order that by its terms would actually bar  
18 the discovery that Your Honor has granted.

19 We filed a big objection saying this is inconsistent.

20 THE COURT: We, on behalf of whom?

21 MR. BENTLEY: Sorry, we? The unsecured creditors'  
22 committee in this case -- we filed an objection before --

23 THE COURT: In Judge Fitzgerald's case?

24 MR. BENTLEY: We, as the creditors' committee in GM  
25 filed an objection to what Caplin & Drysdale had filed before

1 Judge Fitzgerald, saying that this order that they're asking  
2 her to enter would bar the discovery that Your Honor has  
3 permitted. That it's an attempt to collaterally attack Your  
4 Honor's ruling, which you'll recall, back in August, counsel  
5 for the trusts represented they would not do. This order, by  
6 its terms, would have that effect.

7 Now, to be fair, Your Honor, they didn't serve this  
8 order on us. I don't know if that was deliberate or not. And  
9 after we filed our objection they called us up and they said  
10 oh, we're not trying to do that, and we'll negotiate a  
11 modification of the order that will make that clear. But this  
12 was an order that by its terms would have had that effect.

13 And that's just an example, Your Honor, of how  
14 there's a lot more going on here than confidentiality. They're  
15 concerned that this is going to have a big impact on how they  
16 conduct litigation. And that, I submit, is what's behind  
17 everything you heard from Mr. Swett.

18 And by the way, there were a lot of other  
19 misrepresentations or inaccurate statements that I won't go  
20 into unless Your Honor wants me to, like that this is discovery  
21 that's not available in the tort system. We addressed that in  
22 our briefs before Your Honor in August and then again in  
23 October. And it's just not true. But I don't think we need to  
24 go there.

25 I'm happy to yield to Mr. Karotkin at this point,

1 Your Honor.

2 THE COURT: Before you do, Mr. Swett said listen,  
3 he'll just stipulate that you get the credit for the average  
4 amount that was dished out by each of those trusts. You want  
5 to comment on the strengths and weaknesses of that? It sounds  
6 to me like -- I wondered, and sometimes my wondering doesn't  
7 turn out to be justified or not -- that he's sufficiently upset  
8 about Mullin getting this stuff, that he's willing to give you  
9 credit for the average amount in each of those other cases and  
10 give to you kind of what you're looking for.

11 MR. BENTLEY: And, Your Honor, I've just been handed  
12 a note, because we've been trading e-mails with Bates White  
13 about the proposed stip. And I think the short answer, Your  
14 Honor, is we would like to consider that. The stip falls far  
15 short of the relevant information that we'd be getting through  
16 the discovery. It doesn't tell us about variation law firm by  
17 law firm, state by state. It doesn't tell us what exposure  
18 allegations were made to the various trusts, which is relevant  
19 for the reason I mentioned a few minutes ago.

20 Neverthe -- so we think it's a pale substitute for  
21 the discovery we'd be getting. Nevertheless, it's a  
22 substantial proposal. It's a significant one. We're prepared  
23 to consider it. And I'd prefer not to do it on one foot, so to  
24 speak.

25 THE COURT: I understand.

1 Mr. Karotkin, can I get your perspective, please?

2 MR. KAROTKIN: Thank you, Your Honor. Stephen  
3 Karotkin for the debtors.

4 I would like to think my interests are always closest  
5 to yours, Your Honor, in these cases. I think -- you know,  
6 Your Honor, I think you put your finger on it, I think it was  
7 at the beginning of Mr. Bentley's comments, that asbestos --  
8 this is not an asbestos-driven case, not even close -- not even  
9 close. And what was supposed to be a minor sideshow has now,  
10 unfortunately, in my view and I think perhaps in the Court's  
11 view, becoming a main event and threatening to hold up  
12 distributions with respect to, you know, let's say thirty-five  
13 billion dollars of other claims.

14 And I think what has happened here, Your Honor, is  
15 that the novel approach that the unsecured creditors'  
16 committee, the Bates White firm, has taken in this case, to how  
17 the estimation process ought to take place, has driven us in  
18 that direction. And I think that what Mr. Swett indicated in  
19 his comments are very telling and very true. This has never  
20 been done before.

21 I know that Mr. Swett has been involved in a lot more  
22 estimation proceedings than I have. We have spoken with our  
23 expert. And this information and this approach has never been  
24 used before in estimating asbestos claims, in real asbestos  
25 cases. And what has happened here is we have embarked --



1 THE COURT: In real asbestos cases, you mean  
2 asbestos-driven as --

3 MR. KAROTKIN: Yes.

4 THE COURT: -- Chapter 11s?

5 MR. KAROTKIN: Yes. And for example, I do have some  
6 experience. I was involved in the original EaglePicher case,  
7 which was the first 524(g) injunction after the statute was  
8 enacted. I represented the debtor there. Many of the same  
9 experts were involved -- not the Bates White firm. This  
10 information was not -- the trusts didn't exist back then, but  
11 no one embarked on this type of path. In Armstrong I  
12 represented the debtor, Your Honor. And the estimation  
13 proceeding was rather straightforward.

14 And it's interesting to note what's occurred here.  
15 And it all occurred based upon the initial 2004 examination  
16 sought by the creditors' committee, which goes back, I believe,  
17 to August. And that's what has turned this into a real -- in  
18 my view, a real donnybrook. And let's sort of put that in  
19 perspective.

20 They made their motion back in August. The result of  
21 that was Your Honor granted certain relief. The original  
22 confidentiality order, Your Honor, that was negotiated in that  
23 case, the confidentiality provisions, took over a week to  
24 negotiate. It was the most incredible process in which I've  
25 ever been involved. All of the lawyers involved in that

1 process were on the phone for countless hours every day  
2 negotiating what I would have thought was a simple  
3 confidentiality agreement. That cost the estate several  
4 hundred thousand dollars, just that one agreement.

5 And it's interesting. None of these firms have a  
6 financial stake in this. Unfortunately, it's all being funded  
7 out of the estate -- it's really all being funded by the United  
8 States government. They have no financial stake to drag this  
9 out and to use this for whatever leverage they have.

10 The anonymity protocol, I am sure, cost another  
11 several hundred thousand dollars. Your Honor, I'm sure you are  
12 aware of the many pleadings that were filed, the letters you  
13 received, the number of hours and time that was spent in court  
14 and then negotiating that document in the conference room. Now  
15 we have the objections today. And it goes on and on.

16 And Mr. Bentley alluded to the 2004 requests that the  
17 asbestos committee recently served. I don't know if you've had  
18 a chance to look at that. But that's entirely -- entirely  
19 prompted, as Mr. Swett indicated, by what is going on here with  
20 the unsecured creditors' committee. Now that they've embarked  
21 on this escapade, the asbestos committee is now moving forward  
22 and asking Your Honor to approve their escapade, because  
23 they've got to combat or allegedly combat whatever Mr. Bates is  
24 doing and his firm is doing and Mr. Mullin or whatever they're  
25 doing.

1 And you will see, Your Honor, in that motion, they're  
2 seeking discovery from New GM. They're seeking discovery from  
3 Old GM. There are I believe thirty-seven different document  
4 requests -- that doesn't include the subparts. And of course  
5 we'll address that in a responsive pleading. Document  
6 discovery, depositions. But let's not leave it at that. It  
7 also asks you to permit discovery from sixteen -- sixteen other  
8 co-defendants in the system, including not just document  
9 requests, but deposition testimony.

10 I don't even think they were served with this 2004  
11 request, the other sixteen defendants. Perhaps Mr. Swett  
12 knows. I don't know. But I don't think so.

13 And again, solely in response to the unsecured  
14 creditors' committee's unique approach to an estimation -- an  
15 aggregate estimation. And as I said, none of it is necessary.  
16 And I said that initially, Your Honor. Our concern with this  
17 was that this whole process -- embarking on this process was  
18 going to delay these cases unnecessarily, and that if there  
19 were going to be an estimation hearing, it can be a traditional  
20 estimation hearing.

21 And all of the experts -- all of them -- have the  
22 information necessary to do the same type of estimation that's  
23 been done in every other case. They have the entire database.  
24 They've had it for months. The asbestos committee was granted  
25 some additional discovery on a consensual basis. Everybody has

1 everything they need. And we have proposed to Your Honor an  
2 estimation motion and a schedule to move forward on a rather  
3 expedited basis. But again, people can do that now. People  
4 can prepare their expert reports now. And we can move forward  
5 and we can get this finished. And we can get this finished,  
6 obviously subject to your schedule, in January or early  
7 February.

8 An estimation hearing, Your Honor, is not really  
9 difficult. Again, I know it's going to encompass a lot of your  
10 time. It can be done in one day. It's four experts  
11 testifying. It's relatively simple. That's all it is. And  
12 I've been through them; they've been through them. And it  
13 takes a day or two to get finished with it.

14 And I will assure you, Your Honor, if you stop this  
15 process now, and let the parties proceed like they've always  
16 proceeded, we will get a consensual resolution of this mighty  
17 quickly, and we will be done with this, and you won't have that  
18 hearing. And that's our interest. We're not interested in  
19 spending any more money on this. I'm sure the Treasury's not  
20 interested in spending any more money on this.

21 I hate to tell you what the fees have been running  
22 with the various experts in connection with this proceeding.  
23 And we have the classic tail wagging the dog. And, Your Honor,  
24 I agree with Mr. Swett. I think it's time to put an end to it.  
25 I frankly was surprised by the Bates White and Mr. Mullin's

1 relationships. I think that the offer that Mr. Swett made, in  
2 terms of his proposed stipulation, was entirely reasonable. I  
3 believe that he said, with that being done, they don't have the  
4 need for any further discovery. And I think no other party  
5 will have the need for further discovery. And we can move on  
6 and we can get this case finished. Thank you.

7 THE COURT: All right.

8 MR. BENTLEY: Your Honor, thirty seconds, before --

9 THE COURT: If you can honor that promise, Mr.  
10 Bentley.

11 MR. BENTLEY: Even if Your Honor were to permit the  
12 trust discovery, there's an order that Your Honor already  
13 entered that will enable the discovery to be completed in a  
14 timely fashion.

15 THE COURT: Well, the implicit assumption under which  
16 I've heard argument for the last almost two hours is that the  
17 combination of the failure to disclose to me the interests of  
18 Mullin and the Litigation Resolution Group and the points that  
19 Mr. Karotkin made, collectively provide a basis for Rule 59 --  
20 Bankruptcy Rule 9024 relief. So yes, I understand that I have  
21 an existing order.

22 MR. BENTLEY: I was --

23 THE COURT: But the reason I've heard so much  
24 argument is because I'm trying to get my arms around whether  
25 that earlier order, in light of new facts I have, and the way

1 you guys are going at it hammer and tong, has made that order  
2 one for which relief under Rule 59 doctrine is appropriate

3 MR. BENTLEY: I was actually referring to a different  
4 order, Your Honor. I understand that Your Honor has issues  
5 before you that you need to consider. I was making a different  
6 point -- trying to make a different point.

7 THE COURT: Go ahead.

8 MR. BENTLEY: And that is, Your Honor will remember,  
9 you entered an order on October 22 -- a stipulated order that  
10 implemented the anonymity protocol. There was a provision in  
11 there about timing.

12 THE COURT: About what?

13 MR. BENTLEY: Timing. Specifically it said -- the  
14 ACC agreed that under -- and it's put into the order -- that  
15 initial expert reports will be filed six weeks after the trust  
16 production will be made. Under the prior order, the trust  
17 production will be made seven weeks after Your Honor rules on  
18 the meso claimant objections.

19 So my point is simply, that order is in itself a  
20 ground for Your Honor to say to the ACC, you can't take new  
21 discovery now, you've waited too long to do it, if the new  
22 discovery would delay the January 10 deadline. If Your Honor  
23 were to enter an order today or later this week resolving the  
24 meso claimant objections, then under the October 22 order,  
25 initial expert reports would be due January 10. We're locked

1 in. The ACC agreed to that. Your Honor so ordered it.

2 They've now waited three and a half months to make  
3 this latest discovery request. Your Honor would have ample  
4 grounds to say, ACC you agreed to this expert report deadline  
5 and the implicit notion that discovery -- fact discovery would  
6 be completed weeks in advance of that. You can't now change  
7 course and ask for discovery that would delay that deadline.  
8 We have a deadline that's already in place. That was simply my  
9 point, Your Honor.

10 THE COURT: All right. I'm going to take a ten --  
11 Mr. Swett?

12 MR. SWETT: Yes, sir.

13 THE COURT: What is it?

14 MR. SWETT: Well, I have some points. I don't want  
15 to belabor it or test your patience. But I have some points in  
16 response --

17 THE COURT: Well, you're not the first guy in this  
18 room who's tested my patience. I'll give you the same amount  
19 of time I gave Bentley just now.

20 MR. SWETT: First, with regard to the deadline that  
21 Mr. Bentley refers to, that was part and parcel of the  
22 compromise anonymity protocol which was negotiated with Dr.  
23 Mullin in the room, with his being the ultimate arbiter for the  
24 UCC of whether or not particular provisions were acceptable,  
25 and with his insistence on matching the individual claimants

1 from the trust data to his other data sources. Had I known --  
2 and I did not -- of Dr. Mullin's mixed capacity, I would not  
3 have agreed to that anonymity protocol. And that's part of the  
4 issue that you will need to consider under Rule 59.

5 Now, in the Delaware proceeding that the -- some  
6 trusts and trust advisory committees have --

7 THE COURT: Which -- this is the one before Judy  
8 Fitzgerald?

9 MR. SWETT: Yes, it --

10 THE COURT: Which case is that, by the way?

11 MR. SWETT: -- it's a new adversary proceeding filed  
12 in the Bondex case and in the other bankruptcy cases from which  
13 the trusts emerged. It has no reference to General Motors. We  
14 recognized that this case was too far along. And we didn't  
15 bring them in. And when they misunderstood what we were trying  
16 to do, and filed an objection, we promptly called them up and  
17 said that is not our intention. We will give you a stipulation  
18 that keeps you out of this.

19 We are respecting the separate track that this case  
20 is on and the separate and very important timetable that it's  
21 on. So I just wanted to clarify that.

22 Dr. Mullin's business model in the LRG group -- and I  
23 should say, it's not just Dr. Mullin. The website lists three  
24 key people for LRG: Dr. Mullin, Andrew Evans and Peter Kelso.  
25 They all work on the UCC's team in this case. They're all time



1 keepers in that engagement. And they're listed on the website  
2 as the key people for LRG.

3 LRG's website also explains its business model. It  
4 says that through capped indemnification, the client tenders  
5 claims to LRG; LRG handles the litigation, pays claims, manages  
6 liability, and pursues any applicable insurance. And in his  
7 testimony, in the Leslie Controls case, which was where that --  
8 when that deposition was brought to my attention, is where I've  
9 learned of these matters -- he was asked this question: "Are  
10 you buying the liabilities from them? Is that what you're  
11 doing? Or are they selling you the liabilities, I should say?"

12 He says, "Neither is exactly right." He goes on to  
13 say that it depends on what the company's needs are. He does  
14 testify that the idea is they take the financial risk off of  
15 the customer, and they're the ones who gain if the cases are  
16 settled cheaply or lose if the claim values rise.

17 And that is also set forth in website material that  
18 includes, for instance, this statement: "Assuming LRG is able  
19 to manage the litigation successfully, residual funds are  
20 released to us and our investors. If instead there are adverse  
21 developments in the litigation, LRG and its investors lose some  
22 or all of the additional assets contributed." They are  
23 speculators in the management and resolution of the asbestos  
24 liabilities.

25 That was entirely unknown to me. It should have been

1 in the retention application, in which case, both the Court and  
2 the ACC would have had it right in front of them. But the  
3 inferences that Mr. Bentley is trying to raise about how this  
4 was open and notorious, if that's true, it wasn't so open and  
5 notorious as to come to my attention when I'm busily working on  
6 a case.

7 Now, Dr. Mullin and Dr. Bates are very closely tied.  
8 They are the co-authors of virtually all of the publications  
9 that Bates White has put out on asbestos litigation. And they  
10 are not readily divisible.

11 Consider the scenario that I described to you before,  
12 where Dr. Mullin puts off his Bates White hat, dons his LRG hat  
13 and sits down to negotiate the resolution of a bunch of  
14 asbestos claims with a particular law firm. Assume also -- say  
15 it's the Simmons firm; 1,300 GM mesothelioma claimants in that  
16 data. And Dr. Mullin's insisted on the trust production  
17 including the law firm that represents the individual client.  
18 So when they do whatever they do with that data by way of  
19 matching and analyzing and slicing and dicing, he's going to  
20 form impressions of how the Simmons firm has fared in the  
21 negotiation of resolutions with other defendants.

22 He may not remember that, You know, JQ -- John Q.  
23 Public got X dollars on a particular date, but he will  
24 certainly remember that the Simmons firm produced results  
25 within a given range, according to certain factors. And he

1 will bring that knowledge with him to the table when he sits  
2 down with the Simmons firm or some competitor of the Simmons  
3 firm, to play out the hand in negotiating the resolution of a  
4 book of business that he has acquired, he hopes, from a solvent  
5 tort defendant. And that's going to affect the negotiation.  
6 And that's going to affect the outcome.

7 And you set the goal at the first hearing, Your  
8 Honor, when you were inclined to grant the 2004, that that sort  
9 of thing not be permitted. And there's simply no practical way  
10 that the anonymity protocol and the confidentiality agreement  
11 can protect that, can prevent that from happening, because in  
12 the end, they insisted and we knuckled under, not knowing of  
13 Dr. Mullin's conflicting interests, to the direct production of  
14 the claimant-specific information from the trusts, to Dr.  
15 Mullin and his Bates White colleagues who also work in LRG.

16 So we feel very strongly that the order should be  
17 revisited. We are prepared to make that motion at the earliest  
18 date.

19 THE COURT: Mr. Bentley, I've heard enough.

20 We're going to take a recess. And I want everybody  
21 back by noon.

22 (Recess from 11:42 a.m. until 12:06 p.m.)

23 THE COURT: Have seats, please. I gather from my  
24 chambers folks that you reached some agreement that would  
25 obviate the need for me to rule?

1 MR. BENTLEY: Correct, Your Honor, should I --

2 THE COURT: Yes.

3 MR. BENTLEY: -- go to the podium?

4 (Pause)

5 MR. BENTLEY: For the record, Philip Bentley. Yes,  
6 Your Honor, I'm glad to say that -- here's the understanding  
7 and the agreement that we've reached.

8 We, the unsecured creditors' committee -- I'm sorry.  
9 I, as counsel to the unsecured creditors' committee, am going  
10 to recommend to our client -- we need to get the client's  
11 approval -- but I'm going to recommend to them that they accept  
12 the stipulation that Mr. Swett offered in court today.

13 One additional wrinkle. And that is, we had some  
14 discussions, myself, Mr. Karotkin and Mr. Swett, about what  
15 impact does this have on the pending -- the ACC's pending Rule  
16 2004 request. And the agreement we came to is that assuming my  
17 committee approves this stipulation, the ACC will withdraw its  
18 Rule 2004 application as to all parties other than the debtors  
19 and New GM. And as to the request to take discovery from the  
20 debtors and New GM, both the ACC and the debtors and New GM  
21 reserve their respective rights.

22 THE COURT: Um-hum. Mr. Swett first, then Mr.  
23 Karotkin. Did he get it right?

24 MR. SWETT: He was correct as far as it went, but he  
25 neglected to mention that his subpoenas will be withdrawn. We

1 would ask, in addition, that the ruling pursuant to which they  
2 were issued in the first place be vacated. He hasn't agreed to  
3 that. We'd tender it to Your Honor.

4 But we will withdraw the 2004 subpoenas issued to  
5 third parties other than New GM. We will meet and confer with  
6 the Weil Gotshal folks over whatever discovery's been directed  
7 to the debtors; likewise New GM, in an effort to come to  
8 agreement on what work remains to be done in the discovery mode  
9 there. We're not looking to expand it or protract it.

10 So there's the stipulation that we offered on the  
11 record earlier. There is the withdrawal of the subpoenas all  
12 around as they relate to third parties other than New GM. We  
13 withdraw ours against solvent defendants. They withdraw theirs  
14 against the trusts.

15 And in addition, outside of the bargain, we would ask  
16 Your Honor to indicate on the record that you consider the  
17 prior rulings vacated, so that they will not have the spillover  
18 effects that we fear. Thank you, Judge.

19 THE COURT: All right. Mr. Karotkin?

20 MR. KAROTKIN: Yes. I think it's accurately stated.  
21 As to the pending 2004 requests, hopefully we can work that out  
22 with Mr. Swett. If not, we'll be back here on December 2nd,  
23 which is the return date. And we all reserve our rights. And  
24 my only hope, Your Honor, is that this proposed stipulation  
25 does not take nearly the amount of time to draft as the

1 confidentiality agreement.

2 THE COURT: Um-hum. Mr. Bentley, do you have any  
3 problems with what Mr. Swett said?

4 MR. BENTLEY: Everything he said was accurate. Your  
5 Honor, I did omit to mention that we certainly -- pursuant to  
6 this deal, we certainly would be withdrawing our subpoenas.

7 THE COURT: All right. Nothing that was said as the  
8 deal points of the prospective stip or consent order is  
9 offensive to me.

10 I was very near issuing a ruling on what I heard  
11 today which, under the circumstances, I will not deliver,  
12 except to the limited extent of saying that the concerns that  
13 Mr. Karotkin articulated were a matter of substantial concern  
14 to me, and ultimate agreement with the most important points  
15 that Mr. Karotkin made, which I understood to be that we cannot  
16 allow this process to continue in the way that it's been going,  
17 with the associated expense and delay and prejudice to the  
18 creditor body as a whole in the GM case.

19 When the two committees go back -- when counsel for  
20 the two committees go back to their respective committees to  
21 get whatever ratification they perceive to be necessary or  
22 appropriate, I want both counsel to share with their committees  
23 the substance of what I said, and as important as the words  
24 that I said on the record, the body language, which I'm sure  
25 both sides saw.

1 We worked so hard in this case to get to the point  
2 where we are now, that it's a matter of substantial frustration  
3 to me that we're not over the goal line yet. And I think we  
4 need to redouble our efforts to remember why we're all here.

5 All right. Am I correct that we have no further  
6 business?

7 MR. KAROTKIN: Yes, sir.

8 THE COURT: All right. We're adjourned.

9 MR. KAROTKIN: Thank you, sir.

10 (Whereupon these proceedings were concluded at 12:13 p.m.)  
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

**Lisa Bar-Leib**

Digitally signed by Lisa Bar-Leib  
DN: cn=Lisa Bar-Leib, o, ou,  
email=digital1@veritext.com, c=US  
Date: 2010.11.23 14:17:10 -05'00'

LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET\*\*D-486)

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: November 23, 2010